QUESTIONS & ANSWERS

ISLAMIC LAW

Mansoor

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The ISLAMIC LAW

WITH

Muslim Family Laws Ordinance, 1961

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Muslim

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ISLAMIC LAW

CHAPTER 1

Introductory

Q. 1. Write an introductory note on the Islamic Law.

Ans. Introduction : According to Muslims the notion of law is that which is communicated by God to His men. The two fundamental postulates recognised by Muslims are the faith in God and the acknowledgment of Prophethood of Mohammad (peace be upon him). According to them God alone is the Legislator, Mohammad (peace be upon him) is a Legislature and the Qur'an is the Law Book.

Prophet Mohammad (peace be upon him) was born in Mecca in the year 570 A. D. He was a posthumous child. His mother and the grandfather having died when he was just a child, he was brought up by his paternal uncle Abu Talib. Paganism was then prevalent in Arabia. He condemned it very strongly and as a result he was driven out of Mecca and he took refuge among his followers in Medina. This is known as Hejira which marks the beginning of Muslim era. He in the year 623 A. D. fought and won the battle of Badr and in a few years established his absolute supremacy in Arabia. His supremacy was both temporal and spiritual and he was considered interpreter of God's will upon earth. The Prophet Mohammad (peace be upon him) died in 632 A. D. The first three Caliphs were Abu Bakar, Umar and Usman. Here arise the differences and creation of two sects among the Muslims, *i.e.*, Shias and Sunnis. According to Shias the first three Caliphs were usurpers and Ali was the rightful Caliph. They believe that the Caliphate is hereditary while the Sunnis regard it by election. The foundation of Islamic Law is the Qur'an because it is the word of God. The precepts and the usages of Mohammad (peace be upon him) having been inspired by God, they have force of law. In other words what the Mohammad (peace be upon him) said or did, under the direct authority of God and therefore it should have the force of law. The learned men are best to interpret Qur'an and therefore consensus of jurists has also force of law. After all there is the analogical deductions which has the force of law. Consensus of jurists is technically called Qiyas.

Shia and Sunni laws differ in some respects from each other because of different interpretations of Qur'an.

Q. 2. Describe History and development of Administration of Islamic Law during British Regime.

Ans. History of Administration of Islamic Law during British regime : The country remained under a foreign rule namely British Rule from the eighteenth century to 1947. In their early days the British for sometime carried on the administration of Muslim and

Hindu Laws with the help of the Indian Officers who were called "Advisers to Courts" (original and appellate, civil and criminal) who advised on questions of law. The Muslim officers were known as learned Maulvis, Muftis and Ulema and the Hindus were known as learned "Pandits". However, it may be mentioned that criminal proceedings in particular were ordered to be governed by the Shariah irrespective of the religion of the offender unless and until the "East India Company's Government" thought it fit to order otherwise. Being strangers in this field, the British Government, therefore, adopted a policy of compiling or getting compiled English Codes of Muslims Law as for example Hamilton's Hedaya (1791), translations of Al-Sirajiyah and commentary thereon called the Sharifiyah Baillie's Digest of Muhammadan Law (being translation of Fatawa-i-Alamgiri); Tagor Law Lectures (1891-92), the translation of Mishkat-ul-Masabih (extracts from Fatawas by Kazee Khan), Muhammadan jurisprudence (1911) by Abdur Rahim, Principles and Precedents of Muhammadan Law by MaCnaghten, *etc*. With the development of the judicial system following the British pattern through systematized transformation of the educational structure, when lawyers made their appearance this practice had to be abandoned with a further change that in the course of time the Islamic Laws relating to crime, punishments, revenues land tenancy, proceedings, evidence and partly transfer of property were gradually replaced by enactments of the Legislature. Certain aspects like marriage, dower, divorce, maintenance and guardianship, succession, inheritance, gifts, wills and wakfs, and family matters were still governed by Islamic Law with certain modifications here and there. Customary law was allowed in some places such as a woman could not inherit agricultural land. However, if a particular sect of Muslims had its own rule generally it was followed with respect to that sect. At this place it may be mentioned that, as stated by Sir Abdur Rahim in his Muhammadan jurisprudence at page 38 whatever may have been the demerits of the condemned system, it should, in airness, be admitted that the *fatwas* of the *Maulvis* so far as they can be found in the page of the old law reports, are a faithful exposition of the Islamic Law on the points covered by them. As the store of information accessible to English readers increased, the Judges, both of the Supreme Court and of the "Company's" Courts, began to fall less absolutely dependent on native assistance; and at last, after the extinction of the "Company", and the fusion of the two sets of Appeal Courts in the new High Courts, it was considered that the time had come for dispensing with the latter altogether, at least in the form of Maulvis regularly attached to the Courts, and whom the Court was bound to consult. The study of Islamic Law was not less important and remunerative than before, but in a different way; henceforth it became the business of the Bar to instruct Bench, and the later reports are increasingly full of learned arguments in which untranslated Arabic authorities are freely cited by advocates who combine with this special learning a general legal

knowledge to which the Court Maulvis made no pretension. Moreover, the Bench, in its turn, gradually became better qualified to instruct the Bar. All the High Courts have had learned Muslims among their Judges since 1908. Some of the Judgments delivered by Mahmood, J., at Allahabad (1887-1893), and by Ameer Ali, J., at Calcutta (1890-1904), are, in fact, exhaustive monographs on difficult points of Islamic Law. During the British regime there used to be promulgated laws for this country by means of what are in legal terminology called Charters, Letters, Patents, Despatches, Acts, Ordinances, Orders, Regulations, Rules, Bye-laws and other legal instruments of similar nature and description. When Pakistan was created the Indian Independence Act, and other Acts and Orders, *etc.*, issued at that time, authorised all existing laws to continue till they were altered or repealed, *etc.* Same was the theme of the 1956 Constitution, 1962 Constitution, and the 1973 Constitution. **P L D 1980 S C 160.**

Q. 3. Who is a Muslim ? What is the effect of conversion to and from Islam ?

Ans. Muslim : If Islamic law is to be applied to Muslim, the natural question that arises is : who is a Muslim ? There is a lot of difference between the viewpoint of law Court and theologians.

Among theologians themselves, there are three different views on the subject :

(*i*) A Muslim is one who believes in the Prophethood of Mohammad ;

(*ii*) Every one who believes in *Kalima*, that is, there is no God but God and Prophet Mohammad is His Messenger, is a Muslim ; and,

(*iii*) A Muslim is one who believes not only in the above two but also conforms to certain other standards, for example, he believes in the following five-fold classification of human actions, namely---

(*a*) *Farz*, act the omission of which is punished and the doing of which is rewarded ;

(*b*) *Mustabaab*, acts the doing of which is rewarded but the omission of which is not punished ;

(*c*) *Taiz* or *Mubah*, acts the doing of which is simply permitted and which carry neither reward nor punishment ;

(*d*) *Makruh*, acts which are disapproved but are largely valid ; and

(*e*) *Haram*, acts which are strictly prohibited and punishable.

The Courts of Law, however, never ventured to enter into this essentially theological controversy. Their attitude is simple :

"Every person who believes in the unity of God and the mission of Mohammad as a Prophet is a Mussalman to whatever sect he may belong."

This simple definition of a Muslim has been propounded by Justice Ameer Ali in his book on Muslim Law first and since then it has been invariably followed by different High Courts.

According to Courts of Law a Muslim is a person who professes Islam. He believes that there is no God but Allah and that Mohammad is His prophet. In Baillies Digest Muslims have been defined as all those who pray towards the Kiblah (Mecca).

Effect of conversion : A person who was born as Muslim remains so until he renounces this religion and the mere fact of adopting some Hindu form of worship does not amount to such renunciation. In case of a Hindu embracing Islam, he is governed by Islamic Law. According to the Islamic Law, a Hindu cannot succeed to the estate of Muslim. Therefore, if a Hindu, who has a Hindu wife and children, embraces Islam and marries a Muslim wife and has children by her, his property will pass on his death to his Muslim wife and children, and not to his Hindu wife or children.

Q. 4. Write a note on the Islamic concept of Equality between man and man.

Ans. Concept of Equality : Islam is a "Deen" which provides guidance for Muslims in all fields including economic field. Contribution of Holy Qur'an as well as Ahadis in this direction is marvellous and outstanding. Islam is first religion to propagate in class-dominated and class-spilt world, concept or equality between man and man. It proclaims creation of a society in which if any preference is given it is given to those who are more pious and God-fearing. In this respect address of Holy Prophet (PBUH) in Hajjatual Wada stands as a model for creation of a classless society in world which must be free from exploitation or of any mischief. **N L R 1984 SD 121.**

Islam recognises private ownership to extent that it is beneficial to society. Those upon whom riches are bestowed are made trustees of their wealth and are bound to spend and utilise it subject to limitation imposed on its use. Exploitation by one, of another human being which would include one's aggrandisement at cost of another or addition to wealth of a person in a manner which is detrimental to others, not permissible in Islam. Such earning is like earning through wrong means and cannot be held to be lawful. **N L R 1984 S D 192.**

Q. 5. Write a short note on Muslim Sects and sub-sects.

Ans. Muslim Sects and sub-sects : The growth of various

schools in Islam is identical with the growth of different ideas in any other system of law and any other system of jurisprudence. While studying the other jurisprudence, we see, that various controversies arose among the thinkers of various ages and each exponent has millions of adherents. In fact, the history has been teaching us that more the controversies, more the stability of thought. Thought does not develop with one idea, but with the attainment of two ideas--one against the other. It is through the teeth of arguments and counter-arguments that our thought acquires the essential scaffold of logic. It is to the same controversy in the law Courts to which we owe the stability of our justice. It is again to the debates in the Assembly that we owe the nationality of our law. It was in the light of the historical necessity and for vital social need that these schools of thought grew in Islam.

Broadly speaking there are only two sects among the Muslims, *i.e.*, Sunnis and Shias. Sunnis are divided into four sub-sects, *i.e.*, Hanafis, Malikis, Shafeis and Hanbalis. Sunnis generally belong to Hanafi's School. Shias are mainly divided into three sects, *i.e.*, Athna-Asharias, Ismailyas and Zaidyas.

Every Muslim is governed by the law of his own sect when the dispute is between persons of the same sect. Any Muslim who has attained the age of puberty may renounce faith from the sect or sub-sect to which he belongs and may adopt faith in any other sect or sub-sect.

Change of Sect : A Muslim male or female who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt the tenets of the other sect or any other sub-sect and he or she will thenceforth be subject to the law of the new sect or sub-sect.

Marriage between a Shia male and a Sunni female : A Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia Law.

The same proposition, it appears, holds good in the case of the marriage of a Shia female with a Sunni male.

Q. 6. Describe the characteristics of the different Sunni Sub-Schools.

Ans. In the last question it has been described how the different Sunni Sub-Schools came into existence. They are :--

1. Hanafi School.
2. Maliki School.
3. Shafei School.
4. Hanbali School.

1. Hanafi School : Hanafi School was founded by Abu Hanifa. The characteristic feature of his school was that it placed little reliance on the mass of oral traditions and applied severe test, based on

reason and analogy, to find out their genuineness. Since its inception this school has enjoyed the continuous favour of the Caliphs and Emperors. The favouritism and the statemanship of Abu Yusuf, a disciple of Abu Hanifa, make its doctrine more humane and practical than those of other schools especially in the treatment of women, the KITABIAS and non-Muslims.

2. Maliki School : The action of Abu Hanifa gave rise to Maliki School, founded by Malik who was in his time the highest authority on Hadis. He leaned more upon traditions and the usages of the Prophet and the precedents established by companions. It is the only School in which a married woman is not the complete mistress of her own property and in which the 'Patria potestas' over adults of both sexes remains a reality. According to Fitzgerald, "The combination of two streams in history, one rigidly conservative and orthodox, the other innovating, has had, as might be anticipated, curious result in the Law of Contracts: its views on usury are of the sternest, yet it is the only school to recognize a debt as a legal thing". But the great teachers of the Maliki School were almost exception judges and practising lawyers and the prevailing tone to their work is therefore, practical. They recognize custom perhaps more emphatically than any schools. Khalil says, "Customary law has the same force as law".

3. Shafei School : Shafei School is associated with the name of Shafei who was noted for his balance of judgment and moderation of views. He interpreted more liberally the diction of the Prophet : "My people will never agree in error". He agreed with Malik in adopting ISTIDALAL as the fifth source and rejected Abu Hanifa's equity of jurists. Fitzgerald observes, "With a very keen dialectic and a somewhat more academic tone (as having had much less to do with practical problems of Government), the school is uncompromising in its attitude to custom. Custom has had its revenge; and wherever Shafei doctrine predominates, a large and flourishing body of customs exists alongside the law".

4. Hanbalis : Hanbalis School owed its origin to Hanbal who adhered rigidly to traditions. He interpreted them liberally and hardly reconciled with the doctrines of agreement and analogy.

Q. 7. Write short notes on (1) Istihsan (2) Istislah (3) Istidlal (4) Ijtihad (5) Taqlid (6) Fatwa.

Ans. (1) Istihsan : With the expansion of Muslim Commonwealth and with the passage of time the jurists found that sometimes analogical deductions (Qias) could not adapt themselves to the new habits and the usages of the people or that if applied, they would cause hardship and inconvenience. Therefore, to meet such cases they adopted the principle of Istihsan which means literally "approbation" and has been translated as "liberal construction or juristic preference". By this way jurists were able to lay down a rule of

law as would meet with the exigencies of the particular case rather than the rule that an analogy might indicate. The principle of Istihsan was first adopted by Abu Hanifa.

(2) Istislah : Imam Malik, the founder of Maliki School considered the introduction of Istihsan, as recommended by Abu Hanifa, to be open to grave objections. He was of the opinion that ordinarily, analogy was to be the means by which the law was to be made to expand, but if it appears that a rule indicated by analogy is opposed to general utility, the ISTISLAH, *i.e.*, amendment, should be resorted to. Thus the principle of Istislah enables a jurist to amend a rule indicated by analogy when it is opposed to general utility.

(3) Istidlal : It is the name for a distinct method of juristic ratiocination which enables us to presume that a state of things which is not proved to have ceased, still continues. According to Abu Hanifa it is a principle of juristic deduction, which does not come within the scope of analogy.

(4) Ijtihad : It means the application by a lawyer of all his faculties to the consideration of the authorities of the law to find out what the law is. The Mujtahids are only entitled to use ijtihad or private judgment in expounding law because of their learning and reputation.

(5) Taqlid : It means the duty of laymen to follow the opinion of jurists in matter not expressly dealt with in the Quran, Sunna or Ijmaa.

(6) Fatwas : Fatwas of Kazis and Muftis are the decisions and decrees of eminent judges. The decisions of Abu Yusuf occupy a prominent place in Sunni Law.

Q. 8. What is the conception of a Family in Islamic Law ? Does it recognize the doctrine of Joint family property ?

Ans. Concept of Family : In Islamic Law the family is based on the patriarchal principle. There are also indications that the family as a social unit was evolved among the Arabs out of the larger unit of tribes. But Islamic Law does not allow the conception of a family to overshadow its fundamental principle, namely, individual responsibility and liberty. Each member of the family is endowed with full legal capacity and the law does not sanction any joint family system of holding property as is prevalent among the Hindus. Whatever authority the law vests in the head of the family is based either on contract or on necessity for the protection of those members of the family who are unable to take care of themselves. Apart from certain conjugal rights of the husband and the wife, the idea of communality or residence in a common house does not form any part of the Islamic legal conception of a family. The family relations are founded on consanguinity and affinity.

In Islamic Law, there is not, as in Hindu Law, any presumption

that the acquisitions of the several members of a family living an messing together are for the benefit of the family. If during th continuance of the family, properties are acquired in the name of th managing members of the family, and it is proved that they an possessed by all the members jointly, the presumption is that they an properties of the family and not the separate properties of th member in whose name they stand.

Doctrine of Joint Family Property : Members of a Muslin family carrying on business jointly do not constitute a joint family firm in the sense in which that expression is used in the Hindu Law so a to attract the legal incidents of such a firm. Sons assisting a father i business are presumably his agents and are not his partners unles an agreement of partnership is proved. A minor may be entitled to benefit in the business, but this will not make him liable on a mortgag executed by him alongwith his adult brothers in the course of th business carried on by the latter. The managers of such a business i a Muslim family have no right to impose any liability on the minc members of the family.

CHAPTER 2

Sources of Islamic Law

Q. 9. Give a short account of the Sources of Islamic Law.

Ans. Sources : Following are the main sources of Islamic Law :

(1) The Qur'an.

(2) Hadis, *i.e.*, the precepts, sayings and action of Prophet Mohammad (peace be upon him).

(3) Ijma, *i.e.*, concurrence of opinion of the Companions or successors.

(4) Qiyas, *i.e.*, analogical deductions derived from the comparison of first three sources, when they do not apply to the particular case.

(1) Qur'an : Qur'an is the first and the most important source of Islamic Law. It is the Code of Islamic Law. It is the divine communication and revelation to the Prophet of Islam. The Courts are not to put their own constructions on the Qur'an in opposition to the one made by Islamic commentators of great antiquity and high authority. When a passage of Qur'an was interpreted alike both by Shia and Sunni commentators of great antiquity, they should not attempt to put their own construction in a different manner.

(2) Hadis : The traditions, *i.e.*, the actions, sayings or doings of the Prophet, termed Sunna or Hadis, take the second place as the source of Islamic Law. The Sunnah comprises (*i*) all words, counsels or precepts of the Prophet (*sunnat-ul-qual*) (*ii*) his actions, words and daily practices (*sunnat-ul-fail*) and (*iii*) his silence implying a tacit approbation on his part of any individual act committed by his disciples (*sunnat-ul-taqrir*). The rules derived from these subsidiary sources vary considerably in respect of the degree of authority which is attached to them. Traditions handed down by the contemporaries and Companions of the Prophet are generally considered to be genuine, provided they satisfy other tests.

(3) Ijma : Ijma is third source of Islamic Law in point of importance among other sources of Islamic Law. The learned alone are best able to interpret the Qur'an. A consensus of jurists therefore, has legislative authority. Ijma is "the agreement of the jurists among the followers of Mohammad (peace be upon him) in a particular age on a particular question". When a number of persons who are learned in the Islamic Law and have attained the rank of jurists of some sort agree on a particular legal question, then their opinion is binding and has the force of law. So Ijma is of various kinds :

(1) Ijma of the Companions of the Prophet which is universally accepted throughout the Islamic world and is unrepeatible ;

(2) Ijma of the jurists ; and

(3) Ijma of the people, the general body of the Muslims.

Ijma cannot be confined or limited to any particular age or country. It is completed when the jurists, after due deliberation, come to a finding. It cannot then be questioned or challenged by any individual jurist. Ijma of one age may be reversed or modified by the Ijma of the same or subsequent age.

(4) **Qiyas** : Qiyas is thus defined as "an extension of law from the original text by means of common cause, illat". It is a process of deduction which is not to change the law of the text. It is applicable in cases not covered by the language of the text but may fall under the reason of the text. Matters not provided for by Qur'an, the Hadis or Ijma are to be dealt with by applying the principle of Qiyas or analogical deduction. The rules of law thus deducted are not as authoritative as those laid down by Qur'an, the Hadis or the Ijma. The three sources of law described above could not provide full material for the formulation of complete code nor could they keep pace with the changing times and expanding Muslim Commonwealth. This exigency caused the jurists to apply their own unfettered discretion and reasoning to cases, and Qiyas as a sources of Islamic Law came to be developed.

Besides the above four important sources of Islamic Law, the following are also sources of Islamic Law :

(1) Customs & Usages : The pre-Islamic customs and usages that were not abrogated by the Prophet remained good as law ; the Law of Inheritance in this respect is a glaring instance. Thus it is evident that the Islamic Code included many rules of pre-Islamic customary law which have been embodied in it by express or implied recognition. The Islamic Law will not *per se* admit the validity of any custom which is contrary to, or conflict with, its prescriptions. But in certain localities among certain sects, customs, inconsistent with the spirit of Islamic Law, have been found to prevail, and they have been upheld by the Courts, if not opposed to justice, equity and good conscience. The following are the conditions for a custom to be valid :---

(*i*) It must be prevalent in the country and must be ancient and invariable ;

(*ii*) It need not be existing from the time of the Prophet's Companions ;

(*iii*) In order to be accepted by a Court it is not necessary that certain time must elapse ;

(*iv*) Customs springing up within living memory will be enforced, if prevalent among the Muslims of the country in which the question of its validity has arisen ;

(*v*) General prevelance is necessary, the practice of a limited number of individual cannot be recognised ;

(*vi*) It must be territorial, *i.e.*, the custom of one country will not hold good in another.

(2) Judicial decisions : Judicial decisions have greatly affected the ambit of Islamic Law extending the old principle to cover new cases or doubtful points by means of analogies and interpretations. Judicial decisions have incorporated many a custom which otherwise seemed to be opposed to the tenants of the Islamic Law.

(3) Legislation : Examples of such legislation are the Guardians and Wards Act, 1890, the Mussalman Wakf Validating Act, 1913, the Mussalman Wakf Act, 1923, the Child Marriage Restraint Act, 1929, the Muslim Personal Law (Shariat) Application Act, 1937, the Dissolution of Muslim Marriages Act, 1939, the Muslim Family Laws Ordinance, 1961, Muslim Personal Law (Shariat) Application Act, 1962, etc.

(4) Justice, equity and good conscience : The term "Istehsan" and "Istehslah" in Islamic Law in fact means equity. The term literally means "preference". The abstract theory of law by virtue of this principle is modified so as to meet the demands of society or that the law is modified in its application to actual facts.

The principle of Istehsan (public good) was introduced by Imam Malik. Its literal meaning is "preferring or considering a thing to be good." He maintained that analogy should be the means by which the law should be made to expand, but if the rules are opposed to general utility, then the amendment should be resorted to.

Q. 10. State briefly the Rules of Interpretation of Islamic Law.

Ans. Rules of interpretation : Rules of Interpretation are as under :--

(*i*) The interpretation by the Muslim jurists of great antiquity and authority has to be followed by the Courts.

(*ii*) It is not open to the Court to put its own construction on the Qur'an, in opposition to the express ruling of the commentators of great antiquity and high authority.

(*iii*) It is quite improper for the Courts to speculate on the mode in which the particular text can be reconciled with the law clearly laid down by the commentators.

(*iv*) When the interpretation of a great jurist on a particular precept of Islam in a particular way is available, it should be followed without referring back to original authorities.

(v) New rules of law are not to be introduced as they seem to lawyers or jurists of the present-day to follow logically from the ancient texts however authoritative, when the ancient jurists did not themselves draw those conclusions.

(vi) In case of consensus of opinion among a large and influential section of theologians favouring one construction of the Qur'an, the Court cannot abandon that view even if a contrary view may be more reasonable.

Interpretation of Hadis : Interpretation of Hadis is as under :--

(i) In case of the difference of opinion among the Muslim jurists the point in dispute cannot be decided by the Court itself but reliance should be placed on the opinion of recognised jurists.

(ii) The Courts will not follow any rule of interpretation based on the majority of votes of the old jurists, but commentaries of recognised authorities must be relied upon.

(iii) When such recognised authorities have refrained from giving their pronouncement on any controversial point, and there is a conflict of opinion, the Courts will have a choice to follow one particular opinion or the other.

Interpretation of Hanafi Law : Abu Hanifa is the founder of Hanafi Law and the other two authorities in this respect are his two disciples, Abu Yusuf and Imam Mohammad. General rules of interpretation in case of any conflict amount three authorities is as follows :---

(i) In case of difference of opinion between the founder on one hand and the disciples agreeing *inter se* on the other hand, the opinion of disciples will prevail.

(ii) If there is difference of opinion between Abu Hanifa and Imam Mohammad, that opinion will be preferred which coincides with that of Abu Yusaf.

(iii) If all the three hold different opinions, the authority of Abu Yusuf is generally preferred.

Q. 11. How are the Courts to be guided in case of conflict of views among the different Schools of Islamic Law and their disciples, other A'imma and Faqihs ?

Ans. Guidance of Courts in case of conflict between the views of different Schools : There can be no disagreement in matters which are provided for in the Qur'anic and Traditional Text. Similarly, Ijma is binding upon all, until changed or modified by another Ijma. There is, thus, no room for a Court to disagree with it for, according to the tradition relied upon by Imam Shafi'i, "whatever the community of Islam may agree upon at any time is of God".

In the case of juristic analogy (قیاس) and Istidlal (استدلال) it is open to Courts to adopt any one of the conflicting views of the earlier A'imma and Faqihs, subject of course to the qualification that they possess the requisite knowledge. Lastly, Ijma' and Ijlihad in the form of law made by the competent legislative bodies, as envisaged by the modern reformist jurists, will be binding on Courts and it is not permissible for them to differ from those laws on the ground that they conflict with the views of the earlier A'imma and Faqihs. The history or the development of the Islamic Jurisprudence clearly indicates that the preponderance of the views amongst the Muslim Jurists is that only the qualified jurists of the early days had the faculty of Ijtihad, namely, the right to go back to the original sources for purposes of independent interpretation. They opined that all the jurists since about the end of the Third Hijra are Muqallids, whose duty was only to accept the opinion of their great predecessors without the exercise of private judgment. For this reason the role of the later jurists was mostly confined to resolve the differences of opinion amongst the masters with the object of adopting one or the other view in preference to others, which finds place in the books of Fatwa or legal decisions. The result was that the Judge and juris-consults had no independent capacity and were bound to follow the view of their School in every detail in preference to the views of other Sunni Schools. Since the time the doctrine of Taqlid was adopted, the position has not considerably changed. So far as Court of law is concerned, for obvious reasons it cannot claim with confidence to form independent judgment on intricate questions of Islamic Law. This problem has not arisen for the first time and has received the attention of High Courts in this sub-continent on many occasions.

In the case of *Aziz Banu* v. *Mohammad Ibrahim Hussain*, **A I R 1925 All. 720**, Sulaiman, J., as he then was, *held* that when there is difference of opinion among the jurists the point in dispute cannot be decided by Courts sitting so many centuries afterwards by the examination of traditions only. Reliance must be placed on the opinion of recognised jurists who alone could have undertaken the task of sifting the traditions and, in case of divergence, on their comparative superiority. The question of differing from the views of A'imma and Faqihs should be resolved according to the doctrine of Taqlid. If their interpretation had been accepted as correct by preponderance of authority of the doctors of the later time it should be accepted without any demur. **P L D 1964 Lah. 558.**

CHAPTER 3

Marriage

Q. 12. Define Marriage, explain its object and state the essentials of a lawful marriage.

Ans. Marriage: Following are some of the various definitions of a Muslim marriage:

Hedaya : Defines "Nikah in its primitive sense, means carnal conjunction. Some have said that it signifies conjunction generally. In the language of the law it implies a particular contract used for the purpose of legalizing generation."

According to Ameer Ali : "Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity."

Justice Mahmood : Defines "Marriage among Mohammadans is not a sacrament, but purely a civil contract."

M. U. S. Jung : "Marriage though essentially a contract is also a devotional act, its objects are the right of enjoyment, procreation of children and the regulation of social life in the interest of the society."

According to Abdur Rahim : "The Mohammadan jurists regard the institution of marriage as partaking both of the nature of *ibadat* or devotional acts and *muamlat* or dealings among men." (*Abdur Rahim* 327).

Among all the above definitions, Abdur Rahim's definition is the most balanced one. By using the two ingenious words "*ibadat*" and "*muamlat*", he has summarized the whole concept of Muslim marriage in one sentence. Let us approve of this definition, and proceed to see why Muslim marriage is not purely a civil contract, as Mahmood, J., emphasized, or as to why it is not solely a way to procreate children.

Marriage (*Nikah*) in Islamic Law is defined as a contract for the purposes of legalising sexual intercourse, the procreation and legitimation of children and the regulation of social life. Marriage is considered by Muslim Jurists as a civil contract and a religious duty. It is an act of *Ibadat* and is called *sunnat muwakkidah*.

Every Muslim of sound mind, who has attained puberty, may enter into contract of marriage. Lunatics and minors who have not attained puberty may be validily contracted in marriage by their respective guardians. A marriage of a Muslim who is of sound mind and has attained puberty is void if it is brought about without his consent. Puberty, in the absence of evidence is presumed to have been attained on the completion of age of fifteen years.

Object of marriage : Marriage is a most intimate communion and the mystery of sex finds its highest fulfilment when intimate

spiritual harmony is combined with the physical link. If religion is at all a real influence in life to both parties or to either party, a difference in this vital matter must affect the lives of both more profoundly than differences of birth, race, language, or position in life. It is therefore only right that the parties to be married should have the same spiritual outlook. If two persons love each other, their outlook in the highest things of life must be the same. Note that religion is not here a mere label or a matter of custom or birth. The two persons may have been born in different religions, but if by their mutual influence, they come to see the truth in the same way, they must openly accept the same rites and the same social brotherhood. Otherwise the position will become impossible individually and socially.

Q. 13. What are the essentials of a Valid Marriage ?

Ans. Essentials of a Valid Marriage : (1) There must be capacity to contract marriage :

(*i*) Every Muslim of sound mind, who has attained puberty may enter into a contract of marriage.

(*ii*) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.

(*iii*) A marriage of a Muslim who is of sound mind and has attained puberty is void if it is brought about without his consent.

Note : Puberty is presumed in the absence of evidence on completion of the age of fifteen years. (*Hedaya 529, Baillie 4*). The provisions of the Majority Act, 1875 do not apply to matters relating to marriage, dower and divorce.

(2) There must be proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Muslims. The proposal and acceptance must both be expressed at one meeting, a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor a religious ceremony is required.

Further there must be complete absence of the following impediments :--

(*a*) **Prohibition on the ground of consanguinity :** A man is prohibited from marrying :

(1) his mother or his grandmother howhighsoever ;

(2) his daughter or grand-daughter howlowsoever ;

(3) his sister whether full, consanguine or uterine ;

(4) his niece or great-niece howlowsoever ; and

(5) his aunt or great-aunt howhighsoever whether paternal or maternal.

(*b*) **Prohibition on the ground of affinity :** A man cannot carry with :

(1) his wife's mother or grand-mother howhighsoever ;

(2) his wif's daughter or grand-daughter howlowsoever ;

(3) the wife of his father or paternal grand-father how-highsoever ; and

(4) the wife of his son, or of his son's son or daughter's son howlowsoever. A marriage with a woman prohibited by reason of affinity is void. In case of (2) marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with the wife was consummated.

Q. 14. What restrictions are laid down by Islamic Law as regards marriage ?

Ans. Restrictions as regards marriage : The restrictions laid down by Islamic Law in respect of marriage may be divided as under :

I. Absolute Prohibition

(*a*) **Consanguinity :** A Muslim is prohibited from marrying--

(*i*) his mother or his grand-mother howhighsoever ;

(*ii*) his daughter or grand-daughter howlowsoever ;

(*iii*) his sister whether full, consanguine or uterine ;

(*iv*) his niece or great niece howlowsoever ; and

(*v*) his aunt or great-aunt howhighsoever whether paternal or maternal.

A marriage with a woman prohibited by reason of consanguinity is void.

(*b*) **Affinity** : A Muslim is prohibited from marrying--

(*i*) his wife's mother or grand-mother howhighsoever ;

(*ii*) his wife's daughter or grand-daughter howlowsoever ;

(*iii*) the wife or his father or maternal grand-father how-highsoever ; and

(*iv*) the wife of his son's son or daughter's son howlowsoever.

A marriage with a woman prohibited by reason of affinity is void Under the Sunni Law, actual consummation is necessary to invalidate the marriage with a wife's descendant.

(*c*) **Fosterage** : An act of suckling is regarded as equal to the

act of procreation. A marriage prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations. Such as sister's foster mother, or foster sister's mother, or foster son's sister, or foster brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited by fosterage is void. (*Hedaya 68*).

But the following relations are exceptions and a valid marriage may be contracted with them :--

(*i*) sister's foster mother,

(*ii*) foster sister's mother,

(*iii*) foster son's sister,

(*iv*) foster brother's sister,

(*v*) foster-sister's foster mother,

(*vi*) foster brother's mother,

(*vii*) the mother of a paternal or maternal uncle or aunt by fosterage,

(*viii*) nephew's mother by fosterage, etc.,

(*ix*) foster child's grandmother,

(*x*) mother of son's sister by fosterage,

(*xi*) daughter of child's brother by fosterage,

(*xii*) foster-child's aunt.

The Shia jurists place fosterage and consanguinity on the same footing and refuse to recognise the exceptions permitted by the Sunnis. (*Muslim Law as administered in India and Pakistan by K.P. Saxena*).

II. Relative Prohibitions

(*a*) **Unlawful conjunctions** : A Muslim may not have at the same time two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male they could not have lawfully married, as for instance, two sisters, or aunt and niece. But two such women can be married one after the other or can even marry his deceased or divorced wife's sister. A marriage by unlawful conjunction is irregular and not void.

Under the Shia Law a Muslim may marry his wife's aunt but he cannot marry his wife's niece without her permission.

(*b*) **Polygamy** : The maximum number of wives that a Muslim can have at a time is four. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular. The impediment can be overcome by divorcing one of the previous four wives.

(*c*) **Woman undergoing Iddat :** A marriage with a woman undergoing Iddat of her previous marriage is irregular and not void. But the Lahore High Court held in *Jhandu* v. *Mst. Hussain Bibi*, **4 Lah. 192**, that such a marriage is void. In a later case, however, the same High Court held that such a marriage is irregular and children born are legitimate.

(*d*) **Difference of Religion :** A Muslim male may contract a valid marriage with a *Kitabia* (A Jewess or a Christian) but not with an idolatress or a fire-worshipper. A Muslim woman cannot contract a valid marriage with a non-Muslim. but if she marries a non-Muslim the marriage is irregular and not void.

Under the Shia Law, a marriage between a Muslim male and a non-Muslim female is unlawful and not void ; and so also is marriage between a Muslim female and a non-Muslim male. But a Muslim may contract a valid Muta marriage with a *Kitabia*.

(*e*) **Absence of proper witnesses :** The Sunnis insist that at least two witnesses must be present to testify that the contract of marriage was properly entered into between the parties (for details see question on essentials of valid marriage). The Shias, on the other hand, are of the view that a marriage can be performed even in secrecy by the spouses themselves or their guardians, and it would be quite valid.

III. Prohibitive Prohibitions

(*a*) **Polyandry :** A married woman cannot contract a second marriage during the lifetime of the husband if she does so. the marriage would be void and she can be punished under Section 494 of the Penal Code.

(*b*) **Marriage with a non-Muslim :** [*See Under II* (*d*), *Difference of Religion*].

IV. Directory Prohibitions

(*a*) **Marrying a woman 'enciente' :** It is unlawful to marry a woman who is clearly pregnant by former husband. But if the person has himself caused the pregnancy and marries her, the consensus of opinion is that such a marriage is valid.

(*b*) **Prohibition by Divorce :** The Islamic Law prohibits marriage between a Muslim male and a Muslim female after the pronouncement of a lawful divorce. But this impediment can be overcome if the woman marries another man and obtains divorce from him.

(*c*) **Marriage during Pilgrimage :** Under the Shia Law if persons marry themselves within the sacred precincts of Mecca while on pilgrimage, the marriage is void and the parties can never marry each other again. But Hanafis regard such marriages to be legal.

(*d*) **Prohibition by doctrine of equality (Kafaa) :** The Hanafis hold that equality (*Kafaa*) between the parties is a necessary condition in marriage and an ill-assorted union or a runway marriage is, under certain circumstances, liable to be set aside by Court. (*Ameer Ali*).

Q. 15. What are the formalities of a valid marriage ?

Ans. Formalities of a valid marriage : Marriage may be constituted without any ceremonial ; there are no special rites, no officiants, no irksome formalities. Nevertheless, following conditions are necessary :

(*i*) Offer on the part of one party to the marriage.

(*ii*) Acceptance by the other party.

Note : The offer and acceptance may be made by the parties, or by their agents, if both are competent. In case of legal incompetency, like minority or unsoundness of mind, the guardians may validly enter into a contract of marriage on behalf of their wards.

(*iii*) Presence of two witnesses where the parties are Hanafis; no witnesses are required if parties are Shia.

(*iv*) The words with which the marriage is contracted must be clear and unambiguous.

(*v*) The proposal and acceptance must both be expressed in one and the same meeting.

In certain cases where man and woman are living as husband and wife, the question may arise whether they are presumed to be married.

According to the recognised views, if the cohabitation is continuous and prolonged, the man and woman may be treated as husband and wife. The same presumption will also be there, in the case where the man acknowledges the woman as his wife, or the child born of the union as legitimate.

But where impediments of a nature which render a valid marriage between the parties as impossible, are present, no presumption of marriage may arise. Thus, where the woman is non-*Kitabiya*, related to the man within the prohibited degrees of relationship, the wife of another person, and so on, she cannot be presumed to be the wife.

Q. 16. What is the Legal effects of Valid marriage ?

Ans. Legal effects of valid Marriage : Baillie gives a description of the legal effects of marriage, (*see Baillie*) but the systematic treatment of this point by Fyzee has been adopted here for convenience. (*Fyzee, III*). There are nine legal effects flowing from a valid marriage :

(*i*) Sexual intercourse becomes lawful and the children born of the union are legitimate ;

(*ii*) The wife becomes entitled to her dower ;

(*iii*) The wife becomes entitled to maintenance ;

(*iv*) The husband becomes entitled to restrain the wife's movements in a reasonable manner ;

(*v*) Mutual rights of inheritance are established ;

(*vi*) The prohibitions regarding marriage due to the rules of affinity come into operation ;

(*vii*) The wife is not entitled to remarry after the death of her husband ; or after the dissolution of her marriage, without observing *iddat* ;

(*viii*) Where there is an agreement between the parties, entered into either at the time of the marriage or subsequent to it, its stipulations will be enforced, in so far as they are consistent with the provisions of the policy of the law ; and

(*ix*) Neither the husband nor the wife acquires any interest in the property of the other by reason of marriage.

Q. 17. When is a marriage Irregular (Fasid) and when it is void (Batil) ?

Ans. Fasid and Batil marriages : A marriage may be valid (*Sahih*), irregular (Fasid) or void (Batil). A marriage contracted without the presence of witnesses as required by the Islamic Law is only irregular (Fasid) and it is not void (Batil).

A Muslim is permitted to have four wives at a time but if he contracts a marriage with a fifth one it is only irregular and not *void*. But a marriage with a lady who has her husband living and has not been divorced by that husband is void. A marriage with a lady during the period when she is observing iddat is also only irregular and not void. Marriage of a Muslim male with a Christian or Jewess lady is perfectly valid but with an idolatress or a fire-worshipper female is irregular but not *void*. Similarly marriage of Muslim lady with any non-Muslim is only irregular.

Fasid (irregular) marriages : Following marriages are considered to be Fasid :

(1) Marriage without witnesses, or where the witnesses are deaf or dumbi.

(2) Marriage with a fifth wife, when four are already there.

(3) Marriage with a woman undergoing iddat.

(4) Marriage between majors when either party does not express consent.

(5) Where proposal and acceptance are not made and given at the same meeting.

(6) Marriage of a Muslim woman with a non-Muslim.

(7) Marriage of a Muslim male with a non-*Kitabia* woman.

(8) Marriage where prohibition is relative.

(9) Marriage with two sisters contrary to the rule of unlawful conjunction.

Batil (void) marriage : Following types of marriages are Batil (*void*) :--

(1) A marriage of a Muslim who is of sound mind and has attained puberty if it is brought about without his consent.

(2) A marriage with a woman who has her husband alive and has not been divorced by that husband.

(3) A marriage prohibited on the ground of consanguinity is void. Hence marriage of a Muslim with his mother or grand-mother howhighsoever, his daughter or grand-daughter howlowsoever, his sister whether full, consanguine or uterine, his niece or great-niece howlowsoever, and his aunt or grand-aunt howhighsoever, whether paternal or maternal is void.

(4) A marriage prohibited on ground of affinity is also void. Hence marriage of a Muslim with his wife's mother and grand-mother howhighsoever, his wife, daughter or grand-daughter howlowsoever, the wife of his father or paternal grandfather howhighsoever, the wife of his son, or of his son's son or daughter's son howlowsoever is void.

(5) A marriage prohibited on the ground of fosterage is also void. Hence whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations such as sister's foster mother, or fosters sister's mother, or foster son's sister, or foster brother's sister with any of whom a valid marriage may be contracted.

Q. 18. What is the distinction between Fasid and Batil marriage and what is the effect of Sahih, Fasid and Batil marriage ?

Ans. Distinction between batil and fasid marriages : According to Fatwa-i-Alamgiri, prohibited marriages may be broadly divided into two categories, the Batil and Fasid marriages. Batil mean those which have no legs to stand upon, those that are *void ab origine* : the English term unanimously employed by different commentators is "void". In this category come those that are

perpetually prohibited such as marriage with one's full sister. Under Fasid marriages are grouped those that suffer from a temporary bar, such as :

A void marriage is one which is unlawful in itself, the prohibition being perpetual and absolute.

Thus the marriage with a woman prohibited by (*a*) consanguinity, (*b*) affinity, or (*c*) fosterage is void.

An irregular marriage is one which is not unlawful in itself but where the irregularity arises from accidental circumstances such as the absence of two witnesses, the prohibition is temporary. Thus the following are irregular marriages :

(*a*) A marriage contracted without witnesses.

(*b*) A marriage with fifth wife by a person having four wives, for this objection can be removed by a man divorcing his own wife.

(*c*) A marriage with a woman undergoing iddat, for the impediment ceases on the expiration of the period of iddat.

(*d*) A marriage prohibited by reason of difference of religion. This objection can be removed by the wife becoming a convert to Muslim, Christian or Jewish religion or the husband embracing Islam.

(*e*) A marriage with a woman prohibited by unlawful conjunction. This can be removed by the man divorcing the wife who constitutes the obstacle.

The word 'Fasid' seems to have been derived from the word 'Fasid' which has been used in the Holy Qur'an several times and which means disruption or disturbance of an orderly society as ordained by God. Allama Yusuf Ali has used the English term 'mischief'. A Fasid marriage would, therefore, mean neither strictly an irregular marriage nor an invalid one but a marriage that is disruptive or disturbive of the orderly society as ordained in the matter by God. Perhaps the word 'irregular' tends to minimise the importance of the breach of the rules enjoined in the Holy Qur'an; the word is rather mild and in a society as ours where there is hardly anything 'regular'. It tends to be rather permissive or at least, not discouraging. Invalid at the same time seems to be a strong word, at least, in so far as, marriages during 'Iddat' are concerned, in view of its accepted legal consequences such as legitimacy of children born to the couple. **1979 C L C 558.**

Termination of irregular marriage : According to the case of *Mohammad Maskin* v. *Nasim Akhtar*, **1979 C L C 558**, either of the parties can avoid such a marriage by adopting one of the following modes :

(1) The husband can repudiate his wife.

(2) Either of them can sue to avoid it.

(3) The Court can itself move for its cancellation, if the matter is brought to its notice, by any *pro bono publico.*

(4) Either of them can, on his or her own, terminate the marriage by a simple declaration to that effect.

It means that the women also has, apart from the right of suing in a Court, the right to avoid it by relinquishment. If the union has remained unenjoyed, it can be done even behind the back of the husband but in case of consummation, he has to be informed. The idea is that the husband or wife, as the case may be, ought to know where they stand in relation to each other.

Q. 19. What are legal effects of void (batil) and an invalid (fasid) marriage ?

Ans. Legal effects of void (batil) and an invalid (fasid) marriage : A *batil* marriage being illegal is null and void *ab initio* and creates no civil rights and obligations between the parties. A *batil* marriage is no marriage at all and therefore a Muslim woman can have it declared void at any time. It is mere semblance of marriage without the reality. Syed Ameer Ali observes that "the wife has no right of dower against the husband (unless the marriage is consummated), and neither of them is entitled to inherit from the other, in case of the death of either, during the period when the contract is supposed to have existed. The illegality of such unions commences from the date when the contracts are entered into, and the marriage is considered as totally non-existing in fact as well as in law".

A marriage with a woman prohibited on the ground of consanguinity, affinity, or fosterage is void, the prohibition being perpetual and absolute such marriages are null and void *ab initio* and carry no civil rights. "But" according to Radd-ul-muhtar, "if the man cohabits with the woman after his marriage, she will be entitled to her *mahrul misl* whatever that be, and this is correct. In the *Ziadat* it is stated that it should not exceed the specified dower, and this is the doctrine of the Disciples. So it is according to *Tabiun*". The offspring of such a union does not acquire the status of legitimacy. There are no mutual rights and obligations.

Marriages which are not illegal owing to an inherent defect stand on a different footing. A *fasid* or irregular marriage has no legal effect before consummation. But consummation removes the flaw to the legality of the union, and the wife becomes entitled to dower, specified or proper whichever is less; but where no dower is specified she becomes entitled to proper dower. The children conceived and born during existence of the irregular marriage are held to be legitimate. The wife is required to observe *iddat*, the duration of *iddat* both on divorce and death being three courses.

In cases of irregular marriage a husband cannot sue for restitution. There are no mutual right of inheritance between the husband and wife. There is no right of maintenance in an irregular marriage during *iddat* except where the cause of irregularity is the offence of witness.

(1) Marriage legalises connubial relationship and the procreation of children. The wife is bound to admit the husband to sexual intercourse at reasonable times and places if she has attained puberty and to be faithful and obedient to him.

(2) The wife is bound to observe the *iddat* of death or divorce.

(3) The offspring of such marriage is legitimate.

(4) the marriage creates between the parties prohibited degrees of relationship.

(5) It creates between parties reciprocal rights of inheritance, *i.e.*, each party acquires the right to inherit from the other.

(6) The husband can check the wife's movement reasonably and exercise dominion over her ; but he cannot disallow the visits of her parents or relations within prohibited degrees.

(7) The marriage confers upon the wife the right of dower, maintenance and residence in her husband's house.

(8) The wife is entitled to receive an equal share of the husband's society and an equal treatment in other respects.

(9) The parties are bound to comply with any agreement entered into by them either at the time of marriage or subsequent to it provided the same is not inconsistent with the provisions of any law for the time being in force or public policy.

(10) The wife does not merge her personality in that of her husband. She retains her status and is at liberty to deal with her property in her own way. There is no place for the doctrine of "unity of person" in Islamic Law.

Q. 20. Write a detail note on Iddat.

Ans. 'Iddat' : *Hedaya* defines it as follows : "The term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connexion". It has been further said in *Hedaya* that "the most approved definition of *Iddat* is, the term by the completion of which a new marriage is rendered lawful".

Thus, *Iddat* is the period for which a woman must wait before

marrying again whether in the event of divorce or death. The different periods of *iddat* are as follows.

Cause of dissolution	Marriage whether consummated or not	Period of *Iddat*
Divorce	Consummated	3 courses or, if pregnant, till delivery.
Divorce	Not consummated	No *Iddat*
Death	Doesn't matter	4 months and 10 days or,if pregnant,till delivery whichever period is longer.

In certain case, 'valid retirement' has the same legal effect as consummation. When the husband and wife are alone together under circumstances, which present no legal, moral or physical impediment to marital intercourse, they are said to be in valid retirement.

Thus the period of *iddat* prescribed in case of consummation will apply in case of 'valid retirement' also.

The reasons for observing *iddat* in the case of divorce are---

(*i*) to ascertain whether the woman is pregnant, and

(*ii*) to provide an opportunity to the husband to take the wife back (in revocable forms of *talak*).

And in case of death, the *iddat* is---

(*i*) to ascertain whether the woman is pregnant, and

(*ii*) to provide a period of mourning for the deceased husband.

The period of 4 months and 10 days has been fixed with a view that in such a time pregnancy would become perceptible; if it does not, the *iddat* is terminated. If pregnancy appears, *iddat* continues till delivery. The period of 4 months and 10 days has also been considered by Muslim jurists as sufficient a period of mourning. Similarly, in case of divorce, the period of *iddat* is three courses, because, it has been felt by jurists that one or two menstruation courses may not be sufficient to ascertain pregnancy. If the divorced woman is not of age as to be menstruating, then her *Iddat* lasts for three months, since most women menstruate monthly and a month is equal to one menstrual period

It is one of the legal fictions of Islamic Law that a marriage is taken to subsist even after it is dissolved, notwithstanding that the

husband has died or pronounced a divorce. This legal fiction affects the woman's rights in the following matters, namely:--

(*i*) remarriage

(*ii*) her maintenance

(*iii*) right to inherit from her husband

(*iv*) prohibition against unlawful conjunction (that is husband's re-marriage with her sister).

The woman undergoing *iddat* is also expected to observe *hidad*, that is, abstinence from things of luxury. But according to Shias and Shafes, it is not necessary. Since no legal consequences flow out of non-observance of *hidad* it carries only moral force. The wife is also expected to remain where she was at the time of death or divorce. But this prohibition is also not followed now-a-days.

Under Shia Law, if a man knows that the woman he is marrying is under an obligation to service *iddat*, then the marriage would be void. In case such a marriage is consummated, the parties are perpetually debarred from inter-marrying. In the absence of consummation, however, marriage is possible after the woman has completed her *iddat*.

The Shia Law also provides that an old woman who can now no more become pregnant, or is so young as to be below the age of puberty, need not observe *iddat*.

The woman must observe the prescribed period of *iddat* when *Muta'a* marriage is dissolved by death or divorce.

If husband dies during *iddat*, Hanafi Law says, a fresh *iddat* becomes necessary. The period of this *iddat*, in the view of Imam Mohammad and Abu Hanifa, is three menstrual courses, provided the divorce is pronounced in an irrevocable form. If the woman is not having courses, the fresh *iddat* has to be prolonged so as to include them. Abu Yusuf, however, says that is only three courses, without any prolongation.

The fresh *iddat* need not include these menstrual courses if the divorce was pronounced by the husband in his death illness or in a revocable form (*e.g., hasan or ahsan* form).

Q. 21. What do you understand by Mutta marriage ? Who can be a party to such a marriage and what are the legal incidents thereof ?

Ans. Mutta marriage : "It is lawful among Shias" says Wilson "to enter into a contract of (so called) marriage for a limited period, which may be a term of year, a month, a day, or even part of a day."

The marriage dissolves of itself, on the expiration of the term of marriage. If no time-limit is expressed the marriage is presumed to be permanent and thus it will not be a Mutta Marriage.

The number of wives that can be taken into Mutta Marriage is unlimited. The ceiling of four wives does not apply here.

A Shia male may contract Mutta with a Muslim, Christian, Jewish or Parsi (fire-worshipper) woman, but not with a woman following any other religion. A woman may not contract Mutta with a non-Muslim.

The amount of dower must be specified in the contract of Mutta otherwise the agreement is void.

The child born of a Mutta Marriage is legitimate and capable of inheriting from the father. But, in the absence of an express agreement, neither party to a Mutta is entitled to inherit from the other. Maintenance is not due to the Mutta wife unless it has expressly been agreed upon.

Fyzee says that the old Arabian custom of Mutta was justified as being useful in times of war and travels. But the Prophet prohibited it and later on Caliph Umar suppressed it ruthlessly. Among the Shias themselves, only Ithna Ashari School recognises it, and it is rejected by every other Muslim Schools.

Incidents of marriages in the Mutta : The incidents marriage in the Mutta form are as under :---

(1) there are no mutual rights of inheritance between husband and wife, except by a special agreement ;

(2) if the marriage has been consummated then only wife is entitled to full specified dower, otherwise to half the dower only ;

(3) the wife is not entitled to maintenance under the Shia Law.

(4) the children born out of marriage in the Mutta form are legitimate ;

(5) these children have rights of inheritance from either parties, *i.e.*, their father and mother ;

(6) where cohabitation between man and woman commences in the marriage in the Mutta form, and there is no evidence as to the period for which such marriage was contracted, and the cohabitation continues, the inference would be unless contrary is proved that Mutta form of marriage continue during whole period of cohabitation and the children conceived during this period would be legitimate and capable of inheriting from their parents ;

(7) if parties continue to live as husband and wife after the expiry of specified period, the inference would be that the term was extended during the whole period of cohabitation and the children conceived during this period are legitimate ;

(8) on the expiry of the term, a marriage in the Mutta form is deemed to be dissolved *ipso facto* , such a marriage is also dissolved by death ;

(9) no right of divorce is recognised in Mutta Marriage, but the husband may make a gift of the unexpired period (hiba-i-muddat) or the parties may separate by mutual consent.

Q. 22. What is the distinction between "Nikah" and "Mutta" ?

Ans. Distinction between "Nikah" and "Muta" : A *nikah* marriage is a permanent contract having for its object the procreation and legalizing of children. It bears a religious semblance, conferring on the woman the full status of wife, and is prevalent among all the sects of the Muslims. A *mutta* marriage, on the other hand, is, according to the law which prevails among the Muslims of the Shia sect, only a temporary marriage, its duration being fixed by agreement between the parties.

The main points of difference between *nikah* and *mutta* are noted below :

(1) A *mutta* marriage being a temporary marriage, its duration is fixed by agreement between the parties. This is not so in the case of *nikah,* which is a permanent marriage until dissolved by death or divorce.

(2) Some dower must be specified in the case of *mutta* marriage, otherwise it becomes void. Dower may be implied in the case of nikah.

(3) *Mutta* is recognised among the Shias only and never among Sunnis. *Nikah* is recognised both among the Shias and Sunnis.

(4) *Mutta* marriage does not create reciprocal rights of inheritance, it does not confer on the wife any right or claim to her husband's property. In a *Nikah* marriage the parties become entitled to inherit from each other. Children however, in both forms of marriage are legitimate and inherit from both parents.

(5) A *mutta* marriage terminates *ipso facto* on the expiry of the term fixed, no right of divorce being recognised in it. The husband may, however, put an end to the same even before the expiration of the term, by making a gift of the unexpired period (*hiba-i-muddat*) to the wife. In the case of *nikah,* however, there is no question of the *ipso facto* termination or dissolution of marriage. It also recognises divorce.

(6) The wife is entitled only to one-half of the specified dower in case of *mutta* marriage if the marriage has not been

consummated. In the case of *nikah,* however, the wife becomes entitled to her full dower, both prompt and deferred whether the marriage has actually been consummated or not.

(7) In *mutta* marriage there is no minimum limit to dower, but the Hanafi Law recognises the minimum limit of ten *dirhams* in the case of *nikah.*

(8) A wife is not entitled to maintenance in a *mutta* form of marriage under the Shia Law, but a woman married in *nikah* form is so entitled. In both cases, however, the wife has the statutory right to maintenance under Section 488 of the Criminal Procedure Code, 1898. (Section 125 of the new Code, Act II of 1974).

Q. 23. State the Rules relating to Marriage Guardianship.

Ans. Rules relating to marriage guardianship : The marriage guardianship is called the *Jabr* or *Wilayat-ul-Nikah.* The following are the rules of marriage guardianship :

The right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grand-father, howhighsoever, and (3) brother and other male relations, on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.

When a minor has been contracted in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a father or father's father has acted fraudulently, or negligently, as where the minor is married to a lunatic or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty.

By the Dissolution of Muslim Marriages Act, 1939, all restrictions on the option of puberty in the case of a minor girl whose marriage has been arranged by a father or grandfather has been abolished, and under Section 2 (*vii*) of the Act a wife is entitled to the dissolution of her marriage if she proves the following namely :--

(1) the marriage has not been consummated,

(2) the marriage took place before she attained the age of 15 years, and

(3) she has repudiated the marriage before attaining the age of 18 years

When a marriage is contracted for a minor by any guardian

other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty. This is technically called the "option of puberty" (khiar-ul-bulugh).

The right of repudiating the marriage is in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it has, does not repudiate without unreasonable delay. The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated. But the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or from her, as the case may be.

Guardianship of the minor may be of person or property, and in these cases, guardians can be appointed by the Court in certain circumstances. In respect of marriage guardianship it is to be noted, no one can be appointed by the Court. It is the substantive law itself that declares who, for the purposes of marriage is the guardian, although in some cases, the Qazi himself can act as guardian for marriage.

The right of Jabr terminates, in general on the attainment of puberty. After that, the Hanafi or an Ithna Ashari Shiite can marry without a guardian. The Malikis, Shafeis and Fatimid Shiites, on the other hand, hold, that in case of females, Jabr continues until they were married and emancipated from parental control.

Under Shia law, only father and father's father howhighsoever, have a right to give away a minor in marriage.

Q. 24. What is Option of puberty ?

Ans. Option of Puberty : This is also termed *"Khyar-ul-Bulugh"*. When a marriage of a minor has been contracted by any guardian other than the father or father's father the minor has the option to repudiate marriage on attaining puberty. This is called the option of puberty.

Such an option can only be exercised by the wife, if she files a substantive suit under the Act , it cannot be exercised by her in a suit by her husband for restitution of conjugal rights or in any other proceedings. **A I R 1960 M P 212.**

In the case of a girl married during minority, she is entitled to a dissolution of her marriage if she proves the following facts--

(*i*) that she was given in marriage by her father or other guardian ;

(*ii*) that the marriage took place before she attained the age of 15 ;

(*iii*) that she repudiated the marriage before she attained the age of 18 ; and

(*iv*) that the marriage has not been consummated.

Consummation of marriage before the age of puberty does not deprive the wife of her option.

Under the Dissolution of Muslim Marriages Act, 1939, she can repudiate the marriage before attaining the age of eighteen years provided the marriage had not been consummated. In case of male the right continues until he ratifies the marriage either expressly or impliedly by payment of dower or co-habitation.

Q. 25. What are the legal incidents of a valid marriage ?

Ans. Legal incidents of a valid marriage : A valid marriage confers upon the wife the right of ;

(1) Dower ;

(2) Maintenance ,

(3) Suitable matrimonial residence ;

(4) Equal affection and impartiality if he has a co-wife ;

(5) Right to the society and upbringing of her infant children even in case of divorce.

It imposes upon the wife an obligation ;

(*a*) to be faithful and obedient to her husband ;

(*b*) to admit him to sexual intercourse due regard being had to health and decency ;

(*c*) to suckle her own children if the husband cannot afford and maintain ;

(*d*) to observe *iddat*.

Q. 26. Has an infant a right to repudiate his or her marriage on attaining majority ? Is there any limitation put upon this option ? Discuss the differences, if any, between the Shia and the Sunni Law in this respect.

Ans. Repudiation by an infant on attaining majority : The marriage of the minor boy, having been contracted by his father or father's father is valid and binding and it cannot be annulled by him on attaining majority. But if the father or father's father has acted negligently or fraudulently, as for example, where the minor is married

to a lunatic or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining majority.

But if the marriage is contracted for a minor by any guardian other than the father or the father's father, the minor has the option of repudiating the marriage on attaining majority. This right continues until he ratifies the marriage expressly or impliedly as by payment of dower or co-habitation.

This is the law according to Sunni authorities. Among the Shias, a marriage brought about by a person other than a father or grandfather is wholly ineffective until it is ratified by the minor on attaining majority.

So far as the minor girl is concerned, her right of repudiation or the *Khayr-ul-bulugh* is regulated by the Dissolution of Muslim Marriage Act, 1939. By this Act restrictions of the option of puberty whether the marriage has been conducted by the father or father's father or the other guardian have been removed and a wife is entitled to dissolution if :--

(1) the marriage has taken place before she attained the age of 15 ;

(2) if she had repudiated it before coming to the age of 18 ; and

(3) there has been no consummation. It may be noted that under such cases dissolution may be effected only by judicial decree and the Act applies equally to Sunnis and Shias.

Q. 27. Discuss the effect of change of religion on the status of marriage.

Ans. Change of Religion : Before the passing of the Dissolution of Muslim Marriage Act of 1939 apostasy from Islam of either party to a marriage operated as a complete dissolution of the marriage.

But now under Section 4 of the said Act, mere renunciation of Islam by a married woman or her conversion to another faith cannot, by itself operate to dissolve a marriage, though she may sue for divorce on any ground specified in Section 2 of the Act.

It should be noted that Section 4 applies to a case of apostasy of married Muslim woman and apostasy of the Muslim husband would still operate as a complete and immediate dissolution of her marriage.

If, however, a woman has been converted to Islam from some other faith and she re-embraces her former faith the pre-Act law will apply, that is, the marriage will be dissolved.

Q. 28. What are the rights and duties between the married persons themselves ?

Ans. Duties of the wife or Rights of the husband : The duties which a married woman bound to observe are as under :--

1. To reside in her husband's house, but it is not necessary that she should follow her husband from place to place.
2. To allow her husband to have sexual intercourse with her, with due regard to her own health, decency and place.
3. To obey his just commands.
4. To observe strict conjugal fidelity and to observe *purdah* in accordance with the social position of the parties and local custom.

Duties of the husband or the rights of the wife : The rights to which the wife is entitled are as follows :

1. To maintenance from her husband in a manner suitable to his wealth, irrespective of her ability to maintain herself out of the property ;
2. To be provided with a separate sleeping apartment in case of more wives than one; and to an equal share in her husband's society, as far as possible, and equal treatment in other respects ;
3. To the use of an apartment from which she may exclude all other persons except her husband ;
4. To visit and be visited by her parents or children by a former husband with reasonable frequency ; and her own blood relations within prohibited degrees ;
5. To refuse to live with him if he keeps and idol worshipping concubine in the same house with her, and to claim maintenance not withstanding such refusal ; and
6. To dower, and to refuse co-habitation, if it is not paid.

Q. 29. What are the Rights of a Muslim wife ?

Ans. Rights of a Muslim wife : Muslim wife has following rights :--

(1) The right to maintenance from her husband in a manner suitable to his wealth, irrespective of her ability to maintain herself out of her property, so long as she is undivorced, obedient and adult.

If the husband does not maintain his wife, he is liable to be sued for maintenance.

(2) The right to be provided with a separate sleeping

apartment in case of more wives than one and to an equal share in her husband's society, as far as possible, and equal treatment in other respects.

(3) The right to visit and be visited by her parents or children from a former husband with reasonable frequency and her own blood relation within prohibited degrees at least once a year.

(4) The right to the use of an apartment from which she may exclude all other persons except her husband.

These rights of the wife are on the other hand matrimonial obligations of the husband. If the husband fails to perform these, the wife has a right to refuse to render conjugal rights to him.

(5) The right to refuse to live with him if he keeps an idol for worshipping or a concubine in the house with him and to claim maintenance notwithstanding such refusal.

(6) The right to prompt dower and to refuse cohabitation, if it is not paid.

(7) **Right to divorce :** She can purchase her divorce from the husband (khula) She can have the marriage dissolved by Tafwiz. She can also obtain divorce by a judicial decree in cases provided by Section 2 of the Dissolution of Muslim Marriages Act, 1939.

Q. 30. Give a concise but clear statement of the Law of Maintenance of a Muslim wife ?

Ans. Maintenance : The Arabic equivalent of maintenance is 'Nafqah' which literary means 'what a person spends over his family', in its legal sense maintenance signifies and includes three things (*i*) food, (*ii*) clothing, and (*iii*) lodging.

Maintenance of wife is the primary duty of every husband. To a Muslim wife this right is guaranteed under the personal law. The wife is entitled as of right to receive maintenance from her husband. She is entitled to maintenance from her husband though she may have the means to maintain herself and though her husband may be without means.

The wife who is regularly married and who has attained an age at which she can render to the husband his conjugal rights is entitled while the marriage subsists to receive from him maintenance according to her health and position in life and his means, provided that she places or offers to place herself in his power so as to allow free access to herself at all lawful times and obeys all his lawful commands.

When the husband is incapable of consummating the marriage

as in the cases of minority or for any other cause, the wife is entitled to maintenance. If the minor has no property his father is bound to maintain her.

The wife does not lose her right to receive maintenance if she refuses access to her husband on some lawful ground, *e.g.*, if she does so for payment of her prompt dower. The wife's right to maintenance ceases on the death of her husband. The widow has no right to receive maintenance whether she be pregnant or not but not so when a woman is observing Iddat for a divorce.

In the case of *Hajran Bibi* v. *Abdul Khaliq*, **P L D 1981 Lah. 761**, it was held by His Lordship Zaki-ud-Din Pal, J., that according to Islamic injunction it is the obligation of a husband to maintain his wife till she disobeys him without any good cause and that being so a husband is obliged to pay even the arrears of maintenance if not paid during the subsistance of the marriage if the wife has not given any cause for their non-payment. If an obligation under the law has not been fulfilled for sometime by paying the maintenance, how a husband can be absolved of his responsibility to fulfil that obligation even at a later stage, as such the arrears of maintenance would be considered to be a debt upon the husband who is liable to pay the same even in the absence of any agreement or a decree in favour of the wife. According to Islam a wife has only to show the case for payment of maintenance allowance that she has been neglected by her husband for such and such time and has not been paid maintenance without any fault. If it is found that the husband has been negligent in maintaining her in spite of being obliged under the law to do so then the wife would be entitled not only to future maintenance but even to past maintenance for the period during which she has not been maintained. The arrears of maintenance being debt upon the husband and he being obliged under the law to maintain his wife he is liable to pay the past maintenance. If an amount is due to a person and is not received by him in spite of having been sent to a third person for the purpose of delivering it to the creditor, it would not mean that since that amount has been sent though not received by the creditor the debtor would be absolved of payment of the amount of debt.

Under the Hanafi Law if the wife renounces Islam, her right to maintenance is lost and does not revive by her subsequent return to Islam but under the Shia Law it revives by her subsequent return to Islam.

The rights of a Muslim wife enumerated above were in addition to the provisions of Section 488 of the Code of Criminal Procedure, 1898 which is now omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

Q. 31. State liability of Father to maintain minor children.

Ans. Father's liability to maintain minor children : A father's liability to maintain his children, excepting of course those who have not been weaned, extends only to such of them as are really in need of maintenance. A child having means of its own is by common consent not entitled to any maintenance from his father. It follows from these premises that a child, who is being already voluntarily maintained by another and, therefore, does not stand in need of, his food, clothing, or lodging cannot require its father to pay maintenance. Similarly a person maintaining the children of another voluntarily without reference to its father would not be entitled to claim its maintenance from the father.

Q. 32. What are the main points of difference between Sunni and Shia marriages ?

Ans. Difference between Shia and Sunni Marriages : The main points of difference between Sunni and Shia marriage may be catalogued as under :--

Sunni Marriages	Shia Marriages
1. There is only one kind of marriage, *i.e., nikah.*	Apart from *nikah* Ashari Shite law also recognises *muta* or temporary marriage for a fixed period of time.
2. The father, grand-father or other guardians can validly give a minor girl in marriage.	The father and grand-father alone have the right to contract an infant in marriage, and a marriage brought about by any other person is wholly ineffective unless ratified by the minor on attaining puberty.
3. The proposal and acceptance must be made in the presence and hearing of two male, or one male and two females witnesses, who must be sane and adult Muslims.	The presence of witness-es is not necessary for validity of marriage.
4 The presence of any witness is not necessary at the time of dissolution of marriage.	The presence of two witnesses is necessary at the time of dissolution of marriage.
5. The proposal and acceptance need not be in any particular form; words conveying the intendment are enough.	There is greater emphasis not on the use of Arabic terminology in regard to it.

6. A Muslim male may contract a valid marriage not only with a Muslim woman, but also with a *kitabia, i.e.*, a Jewess or a Christian, but not with an idolatress or a fire-worshipper, the latter being irregular. A Muslim woman cannot contract a valid marriage except with a Muslim, and any marriage with a non-Muslim, whether a *kitabia* or a non-kitabia (*i.e.*, an idolator or fire-worshipper) is irregular.	A marriage between a Muslim male and a non-Muslim female is unlawful and void, and same is the case with regard to a marriage between a Muslim female and a non-Muslim male. A Muslim male may, however, contract valid *muta* marriage with a *kitabia*, the Shia recognising fire-worshippers among *kitabia*.
7. Punishment for *zina* is not so severe as in the case of Shia.	Punishment for *zina* is severe.
8. He may not marry his wife's aunt on the ground of unlawful conjunction.	A man may wed the niece (though not the sister) of his undivorced wife with the latter's permission; and may conjoin an aunt with her niece even without the niece's permission.
9. Valid retirement (*i.e.*, when the husband and wife are alone together under circumstances that present no legal, moral or physical impediment to marital intercourse) has the same legal effect as consummation of marriage.	It is not regarded as actual consummation for determining the wife's right to divorce.
10. Ten *dirhams* is the minimum dower.	No minimum limit is prescribed.
11. Where the amount of dower is not fixed, proper dower is determined, regard being had to the amount of dower settled upon other female members of her father's family such as her father's sisters.	Proper dower under the Shia Law should not exceed 500 *dirhams*.

12. Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, the rule is to regard part as prompt and part as deferred, the proportion being regulated in each case by custom, and in the absence of custom, by the status of the parties and the amount of the dower settled.

Where it is not expressly stipulated at the time of marriage whether the dower is to be prompt or deferred the whole is regarded as prompt.

CHAPTER 4

Dower

Q. 33. What do you understand by the term Dower ? State briefly the general rules of dower in Islamic Law ?

Ans. Dower : Following are the definitions of dower by eminent Scholars & Judges :

Baillie Defines : ".....the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself... Dower is not the exchange or consideration given by the man to the woman for entering into the contract ; but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman."

Abdur Rahim says : "(It is either a sum of money or other form of property to which the wife becomes entitled by marriage.....It is an obligation imposed by law on the husband as a mark of respect for the wife.....)" This definition has been adopted by Mulla also).

According to **Tyabji :** "Mahr or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties, or by operation of law."

Dower (Mehr) is that financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage in which case proper dower (Mehr Mithl) becomes due. The dower, therefore, is a right which comes into existence with the marriage contract itself except that in case the dower is deferred its enforcement is held in abeyance till a certain event, *i.e.*, dissolution of marriage by death or divorce, occurs. **P L D 1980 Kar. 477.**

Amount of Dower : The husband may settle any amount he likes by way of dower upon his wife, though it may be beyond his means, and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten dirhams. The amount of dower may be fixed either before or at the time of marriage or after marriage, and can be increased after marriage. A contract of dower made by a father on behalf of his minor son is binding on the son. Such a contract may be made even after marriage, provided the son was then a minor. Among Sunnis the father does not, by entering into such a contract, become personally liable for the dower debt, nor is he liable for it merely because he consents to the marriage. But by a decision of the Judicial Committee the rule is otherwise among Shias when the minor son has no means of his own.

If the amount of dower is not fixed, the wife is entitled t "proper" dower (mahr-i-mist), even if the marriage was contracted o the express condition that she should not claim any dower. I determining what is "proper" dower, regard is to be had to the amoun of dower settled upon other female members of her father's famil such as her father's sisters.

Kinds of dower : Broadly, there are two kinds o dowers : (1) specified, and (2) unspecified. But the specified dowe has been further divided into (*i*) Prompt, and (*ii*) Deferred.

(1) **Specified dower :** An amount settled by the parties at the time of marriage or after, is called specified dower. If the bridegroom is minor, his father may settle the amount of dower. Hanafi Law says that the father is not personally liable for the dower, but according to Shia Law, he will be so liable.

The husband is bound to pay the amount of the specified dower, however excessive or beyond the reach it may be.

Prompt and deferred dower : Prompt dower is payable on demand, and deferred dower is payable on the dissolution of marriage by death or divorce. The prompt portion of the dower may be realized by the wife at any time before or after consummation, but the deferred dower could not be so demanded. (*Mulla 215*).

In the case where it is not settled how much of the dower is prompt and what part of it is deferred, the *Shia Law holds that the whole of dower is prompt* ; the Sunni law, however, holds that only a part is prompt. This part is to be fixed with reference to (*i*) custom, or (*ii*) the status of the parties, and (*iii*) the amount of settled dower.

(2) **Unspecified dower :** In such cases where dower has not been settled at the time of the marriage or after, it is fixed with reference to the social position of the wife's family and her own personal qualifications. Help would be taken by taking into account the amounts of dower fixed in case of wife's sisters, paternal aunts *etc.*, and according to the *Hedaya*, the wife's age, beauty, intellect and virtue will also be considered. Such dowers are called *mahr-ul misl*.

Remission : The wife may remit the dower or any part thereof in favour of the husband or his heirs. Such a remission is valid though made without consideration.

Heir's liability : The heirs of a deceased Muslim are not personally liable for the dower debt. As in the case of other debts due from the deceased, so in the case of a dower debt, each heir is liable for the debt to the extend only of a share of the debt proportionate to his share of the estate. Where the widow, therefore, is in possession of her husband's property under a claim for her dower, the other heirs of her husband are severelly entitled to recover their respective shares

upon payment of a portion of the dower debt proportionate to those shares.

Whether a debt : The dower ranks as a debt, and the widow is entitled, alongwith other creditors of her deceased husband, to have it satisfied on his death out of his estate. Her right, however, is not greater than that of any other unsecured creditor, except that she has a right of retention of her husband's property in lieu of dower until it is paid. She is not entitled to any charge of her husband's property, though such a charge may be created by agreement.

Q. 34. How is the amount of dower determined ?

Ans. Determination of the amount of Dower : The amount of dower is ordinarily fixed by oral contract, and this is valid. There is also no limit either to the maximum or minimum of the amount of dower, although the early Hanafi lawyers had fixed ten *dirhams* as the minimum for it and the Malikis considered even a smaller sum as permissible. Their minima have now become obsolete and the amount of dower depends entirely upon other considerations such as the circumstance of husband and the wife, the necessity of a device to prevent on the part of husband the arbitrary exercise of the power of divorce vested in him, the position of the paternal family of the woman, her intellectual attainment or personal attractions and qualification, wealth of her husband, conditions of society surrounding her and the desire of self-glorification surrounding her and the desire of self-glorification and vanity on the part of the parties.

The amount of dower is determined in the following ways :

1. In the case of a valid marriage the wife gets full specified or proper dower, as the case may be, if the marriage was dissolved after consummation or by death.
2. In the case of a valid marriage dissolved before consummation by divorce or by apostasy of the husband the dower payable is one-half of the specified dower, if it is specified, or only a present where it is not specified
3. In case the marriage was irregular and has been consummated, she gets specified or proper dower whichever is less, and where no dower is specified she gets only proper dower.
4. In case of irregular marriage which has not been consummated, no dower is due

Q. 35. What is the difference between Payment of dower and Maintenance ?

Ans. Difference between payment of dower and maintenance : The High Court while pointing out the difference between dower and maintenance, *held*, that the husband's obligation

to maintain his wife commences with the performance of marriage subject to certain conditions. Marriage in Islam being in the nature of a contract, dower is the consideration agreed between the parties which the husband has to pay to the wife either promptly or subsequently in accordance with the terms of the agreement. On the contrary, maintenance is an obligation which is one of the essential incidents of marriage, liable to suspension or forfeiture under certain circumstances. The two incidents, therefore, proceed on entirely different basis. So far as the payment of dower is concerned, once it is stipulated, its payment becomes obligatory on the husband and even if the wife is divorced by the husband before she is touched, he is bound to pay half of the dower money as would be clear from the following verse No. 236 of Sura Albaqra :

وان طلقتمو هن قبل ان تمسو هن و قد فرضتم لهن فريضته" فنصف ما فرضتم

It could of course, be quite different if the wife voluntarily foregoes the dower. As against this, the obligation of the husband to maintain his wife has been derived from an earlier verse No. 232 of the Sura Albaqra which enjoins upon the father of a suckling child to feed and clothe h[illegible]cording to usage :

This finds further from the famous tradition of the Holy Prophet (peace be upon him) :

ولهن عليكم رزقهن و كسو تهن بالمعروف

Q. 36. Discuss the claim of a widow who insists on retaining possession of her deceased husband's property in lieu of her dower. Is her right to retain possession heritable or transferable ?

Ans. Claim of a widow on retaining possession of her deceased husband's property in lieu of dower : The widow's claim for dower does not entitle her to a charge on any specific property of her deceased husband. But when she is in possession of the property of her deceased husband, having lawfully and without force or fraud "retained such possession "in lieu of her dower", she is entitled as against the other heirs of her husband to retain that possession until her dower is satisfied. The right to retain possession is extinguished on payment of the dower debt. This right is some times called a "lien", but it is not a lien in the strict sense of the term.

There is a conflict of opinion whether it is necessary to entitle to widow to retain possession of her husband's property, that the possession should have been obtained by her not only "lawfully and without force or fraud, but also with the express or implied consent of the husband or his other heirs" Some Courts have *held that* no such consent is necessary, while the others have held that it is necessary When mutation of names in the Record-of-Right is effected by the widow with the knowledge of the heirs, they may be deemed to have consented.

A widow who has not obtained possession of her husband's estate in lieu of her dower, cannot exclude the other heirs of her husband from possession. They are entitled to joint possession with her, and if they claim such possession, her only right is to retain possession of what she has before they obtained possession.

If a widow has been in possession of her husband's property in his life-time and continues in possession after his death, the presumption is that her possession has been lawfully obtained and is in lieu of dower. But if the husband has been in possession and the widow takes possession after his death and falsely claims that her dower has been increased, she has no right of retention. Nor is she entitled to retain possession on the mere ground of permissive occupation.

This right is not like a mortgage. Such a right gives no title to her.

A widow in possession of her husband's estate in lieu of dower is bound to account to the other heirs of her husband for the rents and profits received by her out of the estate. But she is entitled in that case to compensation for forbearing to enforce her right to the dower debt; this compensation is allowed in the form of interest on the dower debt. The widow, however, may agree to give up her right to compensation.

The right of a widow to retain possession of her husband's property under a claim for her dower does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise. If she alienates the property the alienation is valid to the extent of her own share it does not affect the shares of the other heirs of her husband.

If besides alienating the property, she delivers possession there of to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate share of the dower debt. The widow is not entitled, on the alienation being *set aside*, to be restored back to possession ; by giving up possession of the property, she loses her right to hold possession thereof. The question as to whether she also loses her right to recover the dower debt is of course doubtful.

If the widow alienates the property, but does not deliver possession thereof to the alienee, as where she executes a mortgage without possession, the other heirs are entitled to a declaration that the mortgage does not bind their shares, but they are not entitled to immediate and unconditional possession thereof.

There is a conflict of opinion whether the widow's right to hold possession is transferable and heritable. One view is that the right is a personal right, and it cannot therefore be transferred by sale, gift or otherwise nor can it pass to her heirs on her death. The other view is that the right to hold possession is property. But is the right both

heritable and transferable ? It has been held in some cases that it is heritable, without expressing any opinion whether it is also transferable. In other cases it has been held it is both transferable and heritable. If it is transferable, can it be transferred without transfering also the dower debt ? Here again there is a difference of opinion. In some cases it has been held that it can be so transferred. But a transfer merely of the dower debt does not pass to the transferee the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable, though it cannot be said with certainty whether it is also transferable. The balance of authority however is in favour of the view that it is also transferable. Assuming that a widow can transfer her dower debt and her right to hold possession till that debt is paid, a deed executed by her which fails to effect a transfer of the ownership with which it purports to deal, cannot operate to transfer the dower debt and the right to hold possession.

The result is that it can be said with certainty that the right is heritable. As to whether the right is also transferable the position is that though it cannot be said to be so with certainty but the balance of authority is in favour of the view that this right is also transferable.

Q. 37. (1) What is the minimum and the maximum amount which can be settled as dower and when does it become payable ? (2) If no dower is settled at the time of marriage, is the wife entitled to any amount as dower ?

Ans. (1) Minimum amount of Dower : Under Islamic Law dower is an obligation imposed upon the husband as a mark of respect to the wife. The husband may settle any amount he likes by way of dower upon his wife though it may be beyond his means and though nothing may be left to his heirs after payment of the amount. But he cannot in any case, settle less than ten dirhams.

Minimum : Hanafis-10 dirhams (Rs. 5--6 after devaluation) Malikis--3 dirhams (Rs. 150--2 after devalution).

Shafis, Shias. } No minimum.

Maximum : Among Sunnis there is no maximum ; any amount may be fixed. Fyzee cites an example, based on his personal knowledge, of a dower amount of Rs. 2,20,00,000/=.

Among some of the sects of Shias, however, there is a tendency "not to stipulate for a sum higher than the minimum fixed by the Prophet for his favorite daughter Fatima, the wife of Ali, namely 500 *dirhams* (Rs. 100/= approximately)."

Amounts of dower and conditions of payment :

(1) If the marriage is consummated, and is dissolved by death

(a) Whole of the specified dower, or
(b) Proper dower if unspecified. — In case of regular marriage.

c) Specified or proper dower, whichever is less, in the case of irregular marriage.

(2) If the marriage is not consummated, and is dissolved by the act of party :

(i) When divorced by the husband :

(a) Half of the specified dower, or
(b) A present of three articles, if unspecified. — In case of regular marriage.

(ii) When divorced by the wife : No dower. — No dower.

(iii) If the marriage is irregular in the cases (i) and (ii) above.

When does it become payable : The amount of dower is usually split into two parts one called prompt which is payable on demand and the other called deferred which is payable on dissolution of marriage by death or divorce.

The prompt portion of the dower may be realized by the wife at any time before or after consumption. Dower which is not paid at once may for that reason be described as deferred dower but if it is postponed until demanded by the wife it is in law prompt dower. But deferred dower does not become prompt merely because the wife demands it.

(2) Wife's entitlement of dower : If the amount of dower is not fixed, the wife is entitled to proper dower, even if the marriage has been contracted on the condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount of dower settled upon other female members of her father's family such as her father's sisters. There are some other determining factors. It has been held by the Division Bench that "the criteria for determining proper dower" are :---

(i) the social position of woman's family ;
(ii) wealth of the husband ;
(iii) the wife's personal qualifications ;
(iv) circumstances and time and condition of society ; and (v) status of husband.

The right of maintenance under Islamic Law arises, if the person claiming to be maintained :

(i) has no property of his own out of which he can maintain himself, and

(*ii*) is so related as to be in the line of inheriting heirs of th person from whom he claims,

(*iii*) provided that the person from whom he claims to b maintained is in "easy circumstances".

But a wife is entitled to maintenance even if she has her ow property. A person is bound to maintain his parents, grandparents sons and unmarried daughters even if he is not in eas circumstances.

Q. 38. Give an account of Proper Dower.

Ans. Proper Dower : If the amount of dower is not fixed th wife is entitled to a proper dower. This is also called *"Mahr-i-misl"* Even if marriage was contracted on an express condition that n dower could be claimed, reasonable amount of it can be claimed Reference may here be made of the opinion expressed by thei Lordships of the Privy Council in *Homira Bibi* v. *Zubaida Bibi*, **(1916) 43 I A 294.** Their Lordships held, "Dower is an essential incident under the Islamic Law to the status of marriage ; to such an extent is this so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principle."

In determining what is proper dower, Courts are generally guided by the undermentioned three considerations :--

(*i*) The social position of the family of woman's father ;

(*ii*) Her own personal qualifications, and

(*iii*) The amount of dower settled upon other female members of her father's family such as her father's sisters.

Besides the above three facts, the position of the husband must not be altogether excluded from consideration as unequal marriages often take place.

The proper dower under the Shia Law should not exceed 500 dirhms.

Q. 39. Give an account of "Prompt" and "Deferred" dower.

Ans. Prompt Dower (mahr-i-muajjal). Prompt or exigible dower is payable to the wife immediately on the marriage taking place, at any time before or after consummation. Proof of connubial intercourse between the parties is not necessary for its payment. It is payable on demand, "unless delay is stipulated for and agreed."

Mehr, observes Tyabji, may be prompt or exigible, *i.e.*, payable immediately or be deferred. Prompt dower is payable immediately.

The proportion of prompt dower is regulated by custom and, in the absence of custom, by the status of the parties and the amount of dower settled. The Court should fix the proportion to be treated as the prompt dower having regard to the status of the family, the amount of the dower and custom, if any, prevailing in the plaintiff's family.

Where the parties though not especially wealthy, were at any rate well off and could not be said to have been poor for the status occupied and there was no evidence showing that there was any custom, out of the amount of dower which was Rs. 51,000. Rs. 12,000 was held suitable as prompt dower. On the other hand, in *Maimuna Begum* v. *Sharafat Ullah Khan*, **(1931 A L J 197),** upon unpleasantness having arisen between husband and wife owing to the husband's desire to have a second wife, it was held by the Court that the plaintiff was held entitled to claim one-half share of the whole dower as the prompt dower with interest at 6 per cent. per annum from the date of the institution of the suit till recovery.

It was further observed in *Nasir-ud-din Shah* v. *Amatual Mughni Begum*, **I L R 1947 Lah. 565, F B.,** that when it is not stated in the *Kabinnama*, whether the payment of the dower is to be prompt or deferred, the custom or usage of the wife's family or of the locality is in the first instance to determine what portion of the unspecified dower is to be prompt and what deferred and in the absence of proof of any custom a presumption may be raised that one-half of the amount stipulated is prompt and the other half deferred, but this presumption can be rebutted by either party and the proportion may be increased or reduced in accordance with the circumstances of each individual case. In considering those circumstances the status of the wife and the amount of the dower must be taken into consideration.

If the husband divorces his wife before consummation she receives half of her specified dower if the dower was prompt. **(1940) 2 M L J 345.**

Although prompt dower, according to Islamic Law, is payable immediately on demand, yet in a large majority of cases it is rarely demanded and is rarely paid; in practice a Muslim husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for payment upon the husband's embarking upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of payment of dower. **A I R 1941 Oudh. 457.**

The mere fact of wife's raising the plea of unpaid dower in answer to her husband's suit for restitution of conjugal rights is sufficient to constitute a demand which would make the dower payable forthwith. **188 Ind. Cas. 130.**

Deferred Dower (mahr-i-muwajjal) : The deferred dower becomes payable only on the expiration of the period specified. If no period is fixed, it becomes payable on termination of the marriage on the death of either of the parties or by divorce.

There is, however, no rule by which it necessarily follows that

the deferred dower becomes realisable only on the death of the husband or if he happened to divorce the wife on such divorce. Parties may agree that the deferred dower may be made payable on demand.

The liability to pay deferred dower is a liability which binds the husband during his lifetime and binds his estate after his death; and unless it is established that the wife had renounced her claim to dower, the debt can be recovered if it is not proved to have been satisfied ; and there is no presumption that every payment of money by a Shia husband to his wife during the continuance of their married life was payment made towards her dower debt. **A I R 1928 Oudh 460.**

"It is customary in India", observes Syed Ameer Ali, "to fix half the dower as prompt and the remaining moiety as deferred; but the parties are entitled to make any other stipulation they choose.....Generally speaking, among the Muslims of Country the *Mahr-i-muwajjal* is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfil the terms of the marriage contract in their entirety."

The interest of the wife in deferred dower is a vested and not a contingent one. It is not liable to be displaced by the happening of any event, not even her own death because her heirs can claim the money if she dies. **A I R 1941 Nag. 167.**

The distinction between "prompt" and "deferred" dower is important inasmuch as if the prompt of the dower is not paid on demand the wife can refuse conjugal rights until it is paid. Further, the non-payment of prompt dower is fatal to a suit for restitution of conjugal rights if marriage is not consummated. But if the suit is brought after consummation of marriage, the Court will only grant a decree for restitution, conditional on the payment of prompt dower. The wife has an absolute right to bring an action for recovery of prompt dower even after consummation. **A I R 1941 All. 181.**

Interest : In the case of a suit for dower, interest at 6 per cent. was given not strictly as interest but as the means of preventing the widow's position being adversely prejudiced by the unnecessary controversy raised against her rights.

Q. 40. Distinguish between 'Prompt' and 'Deferred' dower.

Ans. The following are the chief points of difference between 'prompt' and 'deferred' dower :--

(*i*) Prompt dower is payable immediately after the marriage taking place while deferred dower is payable only after the dissolution of marriage by death or divorce.

(*ii*) The prompt dower must be paid on demand unless delay has been agreed but in case of deferred dower wife is not entitled to demand it unless, agreed.

(*iii*) In case of prompt dower, right of restitution of conjugal right arises only after its payment, while there is no question of restitution of conjugal rights in case of deferred dower.

Q. 41. What are incidents of dower on dissolution of Marriage ?

Ans. Incidents of Dower on dissolution of marriage : On the dissolution of a marriage--

(*i*) if the marriage is consummated the wife is entitled to the immediate payment of the whole unpaid dower both prompt and deferred ;

(*ii*) if the marriage is not consummated, she is entitled to only one-half of the specified dower.

Q. 42. What are the wife's remedies if dower is not paid ?

Ans. Wife's remedies on non-payment of dower : If the prompt dower remains unpaid the wife can refuse to live with the husband and admit him to sexual intercourse. Non-payment of prompt dower is a complete defence in a suit for restitution of conjugal rights by husband. The wife and after her death her heirs may sue for it within three years from the date when the demand is made and is refused or from the date when the marriage is dissolved by death or divorce. Deferred dower can only become due on the dissolution of marriage either by death or divorce if it is unpaid, the wife and after death her heirs may sue for it within three years from the dissolution of marriage.

CHAPTER 5

Divorce

Q. 43. Define Divorce and state the forms of divorce.

Ans. Divorce : Divorce in its original sense means "dismission or rejection but under the Islamic Law it is a release from the marriage tie either immediately or eventually. Divorce in legal sense means the dissolution of the marriage tie of husband and wife. According to Islamic Law, any husband, who is of sound mind and has attained puberty may divorce his wife whenever he desires, without assigning any reason, at his mere whim, or caprice. Under Shia Law free will and intention are essential for valid talak which is not necessary under Sunni Law.

Any Muslim of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause.

A talak may be effected orally (by spoken words) or by a written document called a talaknama.

Classification of divorce : The institution of the dissolution of marriage contest is classified on three different and distinct stand-points. They are as follows :---

(*i*) Classification on the basis of its consequences.

(*ii*) Classification on the basis of the party starting the proceedings.

(*iii*) Classification on the basis of prescribed forms.

Recognised forms of divorce : Following are the different forms of divorce :

(1) Oral talak : No particular form of words is prescribed for effecting a talak. If the words are express (*saheeh*) or well understood as implying divorce no proof of intention is required. If the words are ambiguous (*kinayet*), the intention must be proved. It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her. In a case the husband merely pronounced the word "talak" before a family council and this was *held* to be invalid as the wife was not named. This case was cited with approval by the Judicial Committee of the Privy Council in a case where the talak was valid though pronounced in the wife's absence, as the wife was named.

(2) Talak in writing : A talaknama may only be the record of the fact of an oral talak or it may be the deed by which the divorce is effected. The deed may be executed in the presence of the Qazi or of the wife's father or other witnesses. The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so

superscribed and addressed it is said to be in unusual form. If it is in customary form it is called "manifest" provided that it can be easily read and comprehended. If the deed is in customary form and manifest the intention to divorce is presumed. Otherwise the intention to divorce must be proved.

(3) Illa : Divorce by Illa is species of constructive divorce which is effected by abstinence from sexual intercourse. According to Shafei Law, the fulfilment of such a vow does not *per se* operate as a divorce. But it gives the wife the right to demand a judicial divorce.

(4) Zihar : Zihar is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees the wife has a right to refuse herself to him until he has performed penance. In default of expiration by penance, the wife has the right to apply for a judicial divorce. Cases of Zihar are unknown in our country and it has been doubted by text-book writers whether the wife's rights under Zihar would be enforced by Courts. But law of Zihar has now received statutory recognition in Section 2 of Shariat Act, 1937.

(5) Khula and mubara'at : A marriage may be dissolved not only by talak, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of khula or mubara'at.

"A divorce by khula is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her mahr (dower) and other rights, or make any other agreement for the benefit of the husband". Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce though the husband may sue the wife for it.

A khula divorce is effected by an offer from the wife to compensate the husband if he releases her from his marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (*talak-i-bain*), and its operation is not postponed until execution of the *khulenama*.

A mubara'at divorce like khula, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife and she desires a separation, the transaction is called khula. When the aversion is mutual, and both the sides desire a separation, the transaction is called mubara'at. The offer in a mubara'at divorce may proceed from the wife, or it may proceed from the husband, once it is accepted, the dissolution is complete, and it operates as a *talak-i-bain* as in the case of khula.

According to the case of *Aiyaha Yasmin Abbasi* v. *Maqbool Hussain Qureshi*, **P L D 1979 Lah. 241**, dissolution of marriage by way of *Khula* and *Mubare'a* is irrevocable in so far as the authority of the husband to revoke the same is concerned but the ancillary argument that on account of the stated position of law the proceedings before the Arbitration Council would either be unnecessary or without lawful authority is not acceptable. The spirit of the law would be satisfied if a notice of dissolution of marriage in the form of *Khula'a/Mubara'at* is sent to the Chairman by virtue of the provisions contained in Section 8 read with Section 7 of the Muslim Family Laws Ordinance, 1961. Because of use of the expression "*mutatis mutandis* and so far as applicable" in Section 8, the form of the notice would of course change and it might be different from the one in simple Talak which is to be sent by the husband under sub-section (1) of Section 7 of the Ordinance, 1961. In this case as the nature of the agreement between the parties shows, they having agreed mutually to dissolve the marriage the communication sent by both of them and addressed to the Secretary/Chairman was in accord with the provisions of Section 8 read with Section 7 of the Ordinance, 1961.

(6) **Apostasy from Islam :** Before the Dissolution of Muslim Marriage Act, 1939, apostasy from Islam of either party to a marriage operated as complete and immediate dissolution of the marriage.

After the Dissolution of Muslim Marriages Act, 1939 however, mere renunciation of Islam by a married woman or her conversion to any other religion cannot by itself operate to dissolve her marriage but she may sue for dissolution on any of the grounds mentioned in Section 2 of the said Act.

Apostasy from Islam of the husband operates as a complete and immediate dissolution of the marriage.

Divorce under Shia Law : In the case of *Maryam Bano* v. *Hussain Ali*, **1984 C L C 1961**, it was *held* that Talak according to Shia Law must be orally pronounced by husband in presence of two witnesses and wife in a set form of Arabic words. Written divorce not recognized except in certain circumstances not existing in the present case. Shia Muslim, unable to pronounce Talak in presence of wife in prescribed manner, same can be pronounced in presence of two male witnesses and communicated to her in writing. Nothing on record to show that husband was incapable of pronouncing of Talak in prescribed form before his wife or that Talak was at all pronounced in prescribed form before witnesses. It was *held* that the talak was not valid.

Q. 44. What are Modes of dissolution of marriage ?

Ans. Modes of dissolution of marriage : Among the books on Islamic Law, including that of Baillie, Wilson, Tyabji, Ameer Ali, Mulla

and Saksena, the best classification of divorce has been given by Fyzee. His method of classification is more scientific and easy to grasp, and hence, it has been adopted here with little additions. The discussion which follows in the sequence, however, is not confined to Fyzee alone.

CLASSIFICATION

A. By the death of husband or Wife

B. By the Act of Parties

1. By the husband :

(*i*) *Talak* :

(*a*) *Talak-us-Sunnat* — *Ahsan* (most approved). *Hasan* (approved).

(*b*) *Talak-ul-Biddat* — Triple divorce. One irrevocable divorce (generally in writing).

(*ii*) *Ila* (Vow of continence).

(*iii*) *Zihar* (Injurious comparison).

2. By the wife :

Talak-e-Tafwid (delegated divorce).

3. By mutual consent :

(*i*) *Khula* (redemption).

(*ii*) *Mubara'a* (mutual freeing).

C. By Judicial Process

1. Lian (mutual imprecation).

2. Faskh (judicial annulment).

By the death of husband or wife : It is clear and natural that with the death of husband or wife the marriage comes to an end. When the wife dies, the husband may remarry immediately, but in case of husband's death, widow has to wait till the expiry of *iddat* (4 months and 10 days, or if pregnant, till delivery).

Q. 45. When does Talak become irrevocable ?

Ans. Irrevocability of talak : A talak in the ahsan mode becomes irrevocable and complete on the third pronouncement, irrespective of the Iddat. A talak in the bidai mode becomes irrevocable immediately when it is pronounced, irrespective of the Iddat.

In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce and takes effect immediately on its execution.

Among the Hanafis, a talak pronounced by a man whilst in a

state of intoxication is effective unless the liquor or the drug which causes the intoxication was administered against his will or was taken for a necessary purpose, *i.e.*, medically. Under the Shia Law divorce pronounced in a state of intoxication is invalid.

Q. 46. Distinguish Talak, Khula and Mubara'at and state their legal effects.

Ans. Talak, Khula & Mubara'at : Talak, khula, Mubara'at, are the recognised forms of divorce effected by the act of the parties. Talak is a form of divorce which is a repudiation of the wife by the husband. In law it signifies the absolute or arbitrary power which the husband possesses of divorcing his wife at all times. The consent of the wife or her willingness in the matter is of no consequence. Khula and mubara'at are on the other hand forms of divorce which are based on mutual consent of the spouses and is a peculiar feature of the Islamic Law. Prior to Islam the wife had practically no right to ask for divorce.

If the desire to separate emanates from the wife, it is called khula. In such cases it is usually accompanied by husband in iwaz of his releasing her from the marriage tie.

Three factors therefore come essentially into play in divorce in the khula form :--

firstly, desire to separate emanating from the wife,

secondly, it is accompanied by some consideration proceeding from the wife, and

finally , the consent of the husband as acceptance of the wife's proposal.

According to the case of *Salia Begum* v. *Khadim Hussain*, **1985 C L C 1869**, wife can claim Khula as of right, the only limitation being where it was sought for immoral purposes. Desire of wife to contract second marriage after dissolution of first marriage could not be termed immoral purpose.

In the divorce of the mubara'at form apparently both are happy at the prospect of being rid of each other and so it is effected by mutual consent without passing any consideration one way or the other.

Q. 47. What are the grounds open to a Muslim wife to obtain a decree for dissolution of marriage ?

Ans. Ground open to obtain decree for the dissolution of marriages : There are many grounds open to a Muslim wife for dissolution of marriage :

A woman married under Islamic Law is entitled to obtain a

decree for the dissolution of her marriage on any one or more of the following grounds, namely :

(1) that the whereabouts of the husband have not been known for a period of 4 years ;

(2) that the husband has neglected or has failed to provide for her maintenance for a period of 2 years ;

(3) that the husband has been sentenced to imprisonment for a period of 7 years or upwards ;

(4) that the husband has failed to perform, without reasonable cause his marital obligations for a period of 3 years ;

(5) that the husband was impotent at the time of the marriage and continues to be so ;

(6) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent veneral disease ;

(7) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :

Provided that the marriage has not been consummated :

(8) that the husband treats her with cruelty, *i.e.*,---

(*i*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*ii*) associates with women of evil repute or leads an infamous life, or

(*iii*) attempts to force her to lead an immoral life, or

(*iv*) disposes of her property or prevents her from exercising her legal rights over it, or

(*v*) obstructs her in the observance of her religious profession or practice, or

(*vi*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qur'an ;

(9) on any other ground which is recognised as valid for the dissolution of marriage under the Islamic Law :

Provided that :

(*a*) no decree shall be passed on ground (3) until the sentence as become final ;

(*b*) a decree passed on ground (1) shall not take effect for a period of six months from the date of such decree and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall *set aside* the said decree ; and

(*c*) before passing a decree on ground (5) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent and if the husband so satisfies the Court within such period no decree shall be passed on the said ground.

Q. 48. What are the Rights and Obligations of parties on Divorce ?

Ans. Rights and Obligations : Irrespective of the question as to what is the mode of divorce, the following are the rights and obligations of the parties on divorce :---

(1) Right to contact another marriage : If the marriage was consummated, the wife may marry another husband after the completion of her Iddat ; if the marriage was not consummated, she is free to marry immediately.

If the marriage was consummated, and the husband had four wives at the date of divorce including the divorced wife, he may marry another wife after completion of the Iddat of the divorced wife.

(2) Dower becomes immediately payable : If the marriage was consummated the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred.

If the marriage was not consummated, the wife is entitled to half the amount. If no amount was specified all that she is entitled to is a present of three articles of dress.

Where a marriage is dissolved upon the apostasy of the wife she is entitled to the whole of the dower if the consummation of the marriage has taken place.

(3) Mutual rights of inheritance cease : Either party is entitled to inherit from the other until the divorce becomes irrevocable.

Immediately the divorce becomes irrevocable, mutual rights of inheritance cease except where the divorce was pronounced during the husband's death-illness, in which case the wife's right to inherit continues until the expiry of her Iddat, unless it was repudiated at her own request.

(4) Cohabitation becomes unlawful : Sexual intercourse between the divorced couple is unlawful after the divorce has become irrevocable. The offspring of such an intercourse is illegitimate and

cannot be legitimated by acknowledgment. But the parties may remarry.

(5) Remarriage of divorced couple : Where the husband has repudiated his wife by three pronouncements, it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of the marriage. The presumption of marriage arising from an acknowledgment of legitimacy does not apply to a remarriage between divorced persons unless it is established that the bar to marriage created by the divorce was removed by proving an intermediate marriage and a subsequent divorce after actual consummation. Even if a marriage between the divorced person is proved the marriage is not valid unless it is established that the bar to remarriage was removed : the mere fact that the parties have remarried does not raise any presumption as to the fulfilment of the above conditions. A remarriage without fulfilment of the above conditions is irregular, not void.

In all other cases, the divorced parties may remarry as if there had been no divorce either during the Iddat or after its completion.

Q. 49. What are the effects of divorce ?

Ans. Effects of divorce : Following are the effects of divorce:--

(1) If the marriage was consummated the wife may marry again after the completion of *iddat*, but if it was not consummated, she can marry immediately.

(2) If the marriage was consummated the wife is entitled to immediate payment of whole unpaid dower both prompt and deferred. If the marriage was not consummated she is entitled to half of the specified dower. If no amount was specified she is entitled to a present of three articles of dress.

(3) Either party is entitled to inherit until the divorce becomes irrevocable, except where the divorce was pronounced during husband's death-illness, in which case the wife's right to inherit continues until the expiry of *iddat* unless it was repudiated at her own request.

(4) Cohabitation between divorced couple become unlawful after the divorce has become irrevocable.

(5) Where the husband has repudiated by three pronouncements it is not lawful for him to marry her again until she has married another man and the latter has divorced her or divorced after actual consummation of the marriage.

Q. 50. Discuss the Apostasy & Conversion as grounds of divorce.

Ans. Apostasy and conversion as grounds of divorce : When a Muslim renounces or leaves Islam it is called apostasy; whereas when a non-Muslim embraces or accepts Islam, it is known as conversion.

Apostacy and conversion may affect the marriage tie in the following circumstances :

(*i*) Where husband renounces Islam.
(*ii*) Where wife renounces Islam. } Apostacy.

(*iii*) Where husband embraces Islam.
(*iv*) Where wife embraces Islam. } Conversion

(1) Where husband renounces Islam : Where a Muslim husband renounces Islam, his marriage with his Muslim wife is dissolved *ipso facto*.

As to what constitutes an "act of apostasy", the Lahore High Court, in *Mst. Resham Bibi* v. *Khuda Baksh*, **A I R 1937 Lah. 277** *held* that a formal declaration is sufficient, *e.g.*, 'I hereby renounce Islam'.

(2) Where wife renounces Islam : Section 4 of the Dissolution of Muslim Marriages Act, 1939 says that "The renunciation of Islam by a married Muslim woman.....Shall, not by itself operate to dissolve her marriage.....". The second provision to the same section however, provides that this rule "shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith". For example, Rita is a Christian lady who embraces Islam and marries Raza, a Muslim Rita then re-embraces Christianity. In this case, the marriage of Rita with Raza is dissolved. (*Fyzee, 171*)

(3) Where husband embraces Islam : According to Ameer Ali, if a Christian or Jew (or anybody else following a Divine Book) embraces Islam, his marriage with his Christian or Jewish wife is not dissolved. It will be dissolved, however, if the wife belongs to a non-scriptural religion (*i.e.* Hinduism, Buddhism, *etc.*, because of the fact that a Muslim cannot marry a non-*Kitabiya* woman. Islam has to be offered to such a wife, if she refuses to embrace it, divorce may be given. This offer shall be made by the husband and the law Court has nothing to do with it.

(4) Where wife embraces Islam : If a non-Muslim wife whether she is a Hindu, Christian, Jew or an Irani Zoroastrian embraces Islam, her marriage tie stands intact, irrespective of the fact that the husband is non-Muslim.

For instance, it was held by the Calcutta High Court in *Noor Jehan* v. *Eugene Tischenko*, **I L R 2 Cal. 165**, that the marriage of a Russian Christian wife with her Christian husband is not dissolved

merely because the wife has accepted Islam. Similar were the observations of the Bombay High Court in *Robaba Khanum* v. *Khodadad Bomanji Irani*, **(1946) 48 Bom. L R 864,** where Robaba, a Zoroastrian wife embraced Islam but her husband did not.

Ameer Ali and Fyzee : Ameer Ali & Fyzee remarks on apostasy as :

Ameer Ali : The enforcement of the Muslim Law in its entirety regarding apostate has become impossible under existing conditions in most countries inhabited by Muslims. The legal position of married parties, one of whom abandons Islam, must therefore be determined on principles of the Muslim Law other than those relating to apostasy.

Fyzee : Muslim Law relating to 'marriage' and 'apostasy' are two different branches distinct from one another. Muslim Law never intended apostasy to be used as a means of dissolving the marriage contract.

Fyzee further adds that it must be asked: who is the person that seeks relief ? If the husband changes his religion, it is understandable that the wife should complain and sue for dissolution; and *vice versa*. But is it right and just that one spouse should declare himself or herself a convert and then ask the Court to declare the marriage dissolved ? The result would be that by these means, a party to a marriage would be able to evade the legal obligations of a marriage entered into at a prior time and in accordance with a different system of personal law. (*Fyzee, 176.*)

Q. 56. Under what circumstances, and by what means can a Muslim a wife legally get herself released from a marriage ?

Ans. Release from marriage by a Muslim wife : A Muslim wife may divorce her husband with his consent. Khula and Mubara'at are two forms of such divorce. Khula proceeds at the instance of the wife and is accompanied by some consideration proceeding from her to the husband for release of marriage. In Mubara'at no such consideration is involved.

Zihar : Zihar is a form of divorce obtained by judicial decree where the husband compares the wife to his mother or any female within prohibited degrees. The wife has a right to refuse herself until he does penance. If no penance is done divorce may be obtained.

Lion : Where a husband brings false charge of adultery against the wife, the wife may sue for and obtain a decree for divorce, but not if the charge is true.

Talak-i-tafweez : A stipulation, made whether before or after marriage by which it is provided that the wife will have the right to divorce herself from the husband, under certain specified contingencies invalid. When such a stipulation is made, the wife may,

at any time after the happening of the contingency, repudiate herself in exercise of the power.

Dissolution of Muslim Marriage Act, 1939 : This Act confers upon a Muslim wife the right to divorce her husband by judicial decree under certain specified circumstances. The Act says that a woman married under Islamic Law shall be entitled to obtain a decree for the dissolution of the marriage on any one or more of the following grounds, namely :--

(*i*) that the whereabouts of the husband have been unknown for a period of four years ;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years ;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards ;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years ;

(*v*) that the husband was impotent at the time of the marriage and continues to be so ;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprocy or a virulent form of venereal disease ;

(*vii*) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years repudiated the marriage before attaining the age of eighteen years :

Provided that the marriage has not been consummated :

(*viii*) that the husband treats her with cruelty that is to say :

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment ; or

(*b*) associates with women of evil repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her from exercising her legal rights over it, or

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran :

(*ix*) on any other ground which is recognised as valid for the dissolution of marriage under Islamic Law :

Provided that

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final ;

(*b*) a decree passed on ground No. (*i*) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the decree ; and

(*c*) before passing a decree on ground (*v*) the Court shall, on application by the husband make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

---

beget: Produce (a child)

CHAPTER 6

Parentage, Legitimacy & Acknowledgment

Q. 52. What are the rules of Parentage under the Islamic Law ?

Ans. Parentage, maternity and paternity : Parentage is the relation of parents to their children. Maternity is the legal relation between mother and child, and paternity is the legal relation between father and child.

Establishment of paternity : Parentage is the relation of mother and the father to their children. The maternity of a child is established in the woman who gives birth to the child, irrespective of the lawfulness of her connection with the begetter. Thus for the purpose of maternity, it is immaterial whether the child is an offspring of marriage or an offspring of adultery. The maternity of the child in either case established in the woman who actually gives birth to the child. But paternity is not established unless the child was the offspring of marriage. Thus if a man commits *Zina* with a woman and a child is born, he cannot be considered to be the father of the child, for paternity is established only by marriage. An illegitimate child is not entitled to inherit from the so-called father.

The paternity of a child can only be established by marriage between its parents. The marriage may be valid, or irregular, but it must not be void.

When the paternity of a child is established, its legitimacy is also established.

By the Islamic Law a son to be legitimate must be the offspring of a man and his wife or a man and his slave ; any other offspring is the offspring of *Zina*, that is illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage; but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. One of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son.

Q. 53. What do you understand by Legitimacy under the Islamic Law ?

Ans. Legitimacy : The legitimacy under the Islamic Law means the rules under which a child is considered to be legitimate. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it

can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Presumptions of legitimacy : The circumstances in which legitimacy (or illegitimacy) is presumed are numerous and conflicting. Stating briefly, it will be presumed that---

(*i*) A child born within 6 months of the marriage is illegitimate, unless the father acknowledges it.

(*ii*) A child born after 6 months of the marriage is legitimate, unless the father disclaims it.

(*iii*) A child born after the termination of marriage is legitimate, if born---

within 10 lunar months (Shia Law);

within 2 lunar years (Hanafi Law) ; and

within 4 lunar years (Shafei and Maliki law).

(*iv*) According to Article 128 of Quanun-e-Shahadat, 1984 the fact that any person was born during the continuance of a valid marriage between his mother and any man and not earlier than the expiration of six lunar months from the date of marriage, or within two years after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless--

(*a*) the husband had refused, or refuses, to own the child; or

(*b*) the child was born after the expiration of six lunar months from the date on which the woman had accepted that the period of iddat had come to an end.

Q. 54. What do you understand by acknowledgment of maternity ?

Ans. Maternity : It is the legal relation between mother and her child. Maternity, under Sunni Law, is established in the woman begetting it, irrespective of fact whether the child is sprung from legal or illegal intercourse *i.e.*, incest, fornication and adultery or lawful wedlock. Under Shia Law, such relationship is established only where the child is begotten in lawful marriage. Consequently, under Shia Law there are no mutual rights of inheritance between the mother and her illegitimate child although such mutual rights of inheritance will arise between a woman and her illegitimate child under Sunni Law.

Q. 55. What do you understand by term "Acknowledgment of Paternity" under Islamic Law ?

Ans. Acknowledgment of paternity : "Where the paternity of a child that is his legitimate descent from the father cannot be proved by establishing a marriage between his parents at the time of his conception or brith, the Islamic Law recognizes 'acknowledgment' as a method whereby such marriage and legitimate descent can be established but as a matter of substantive law for purposes of inheritance"

The Islamic Law of acknowledgment of parentage with its

legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of a child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the Law as distinguished from disproved.

In other words the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceed upon the assumption of a lawful union between the parents of the acknowledged child"

In short the doctrine applies only to cases where either the fact or the exact time of the alleged marriage is a matter of uncertainty that is, neither proved nor disproved. Stated in another form, the doctrine is "limited to cases of uncertainty of legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment.

An acknowledgment need not be express. It may be presumed from the fact that one person has habitually and openly treated another as his child, that is, as a legitimate child.

Conditions of a valid acknowledgment : In order to render an acknowledgment valid and effective the following conditions must be fulfilled :---

(1) **Unknown paternity--Fact or exact time of marriage is not certain :** As marriage among Muslims may be constituted without any ceremonial, direct proof of marriage is not always possible. Where direct proof is not available, indirect proof is by way of an acknowledgment of legitimacy in favour of a child.

(2) **Paternity neither proved nor disproved** : It is necessary that marriage between the parents of the acknowledged child must neither be proved nor disproved ; it must be in a state of *not proved, i.e.*, capable of being proved or disproved.

(3) **Intention to confer status of legitimacy** : In *Habibur Rahman* v. *Altaf Ali,* **(1921) 48 I A 114,** the Privy Council observed that "the acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledger meant (*i.e.*, intended) to accept the other not only as his son, but, as his legitimate son."

(4) **Acknowledger must be 12 years older than the acknowledged** : "The limitation that the acknowledged might have been born of the acknowledger means that the age of the

acknowledger should exceed the age of the acknowledged at least by twelve years, and this because it is the minimum period of puberty for a youth ; and this limitation is necessary because if the acknowledger has not attained puberty, the acknowledgment would be falsified obviously."

(5) **Legal marriage must be possible between the parents of the person acknowledged :** The parents of the acknowledged child must not be within the prohibited degree of relationships. Such absolute prohibitions are on the points of (*a*) Consanguinity, (*b*) Affinity, (*c*) Fosterage, and (*d*) Polyandry.

If the parents are within the relative degrees of prohibitions so as to make the marriage between them as irregular but not void, valid acknowledgment can be made of an issue of such a marriage.

(6) **Person acknowledged must not be the offspring of 'Zina' :** An offisping of *Zina* is one who is born either---

(*i*) without marriage, or

(*ii*) of a mother who was the married wife of another, or

(*iii*) of a void marriage.

Baillie says that when a man has committed *Zina* with a woman, and she is delivered of a son whom he claims, the descent of the son from the man is not established, and he cannot be acknowledged.

(7) **Person acknowledged must not be known to be the child of another :** Islamic Law of acknowledgment relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union. **(1988) 10 All. 289**. Thus, where a person is known to be the child of another, valid acknowledgment cannot be made.

(8) **Person acknowledged must not repudiate acknowledgment :** It is a condition that the acknowledged child should verify acknowledgment, because, if the child does not verify, an impediment is created and the child's descent is not established by the mere acknowledgment, but requires proof. However, if the child is too young, such a verification is not essential.

Effects of acknowledgment

(*i*) Acknowledgment of child means acknowledgment of wife also.

(*ii*) It raises presumption of marriage.

(*iii*) It gives rights of inheritance to children, parents and wife.

(*iv*) Acknowledgment once made is irrevocable.

CHAPTER 7

Guardianship of Person & Property

Q. 56. Write a note on Guardian and Minor.

Ans. Guardian : Abdur Rahim defines guardianship as :

"A right to control the movement and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs ; for example, an infant, an idiot, a lunatic. It extends to the custody of the person and the power to deal with the property of the ward."

The term 'guardian' is defined in the Guardians and Wards Act as "a person having the care of the person of a minor, or his property, or of both his person and his property", and no doubt the individual who has by law the right and duty of disposing of a boy or a girl in marriage may be said to have, for that limited purpose, the care of his or her person. But there is no mention of disposal in marriage in any part of the Act, and nothing to indicate that it was intended to interfere with the rules of Islamic Law, which assigns that function. Under the name of *jabar*, it relates to relatives who are not necessarily those entitled to the general care and custody (*hizanat*) of the ward's person.

Concept of guardianship in Islam : In pre-Islamic Arabia, the properties of minors were looked after by guardians taken from among the members of the family. In the absence of any code of conduct, misappropriation and embezzlement were rampant. This necessitated the introduction of most stringent rules for the protection of minors in the Islamic legal system.

According to Ameer Ali, the Quran is full with denunciation against the gross malpractices prevalent in Arabia of those days.

"Restore to the orphans", says the Quran, "when they come of age, their *substance* (property) ; do not substitute bad or good (that is, take not what ye find of value among their effects to your own use and give them worse in its place) nor devour their substance by adding it to your own, for this is an enormous crime." (*Qur'an, Chap. iv, V. 2*).

Minor : A minor is one who is not a major. Puberty and majority are in the Islamic Law one and the same. Among the Sunnis and Shias, puberty is presumed to have been attained on the completion of the fifteenth years. But now, the Muslims are, governed by the Majority Act, 1875, except in matters relating to marriage, divorce and dower, the existing position regarding the age of majority is given as below :

15 years is the age of majority for the purposes of marriage, dower and divorce. He or she is free to do anything in the sphere of marriage, dower and divorce.

18 years is the age of majority in general. As regards other matters of guardianship of person and property, a Muslim will be governed by the Majority Act which prescribes 18 years as the age of majority. Thus in cases of wills, Waqfs, *etc*., minority will terminate on the completion of 18 years.

21 years is the age of majority if the minor is under the Courts of Wards or a guardian of him has been appointed by the Court.

In Islamic Law the term majority is applied to the period of life, whether of males or females which precedes the attainment of puberty, and persons who have not attained puberty are called minors. The law presumes an infant as *dole incapax*, *i.e*., one who cannot exercise his discretion and is not capable of reasoning. The age of reason for either sex is seven years. The age of adolescence for a boy is fixed at twelve years and that of a girl is fixed at the age of nine years.

Q. 57. What is the age of Majority or Puberty as applicable to Muslims ? Who are the proper persons in order of preference for appointment of guardian of the person of the minor ?

Ans. Age of Majority : A person shall be deemed to have become major when he attains---

1. Puberty : In respect of the capacity to act in the matters of marriage, dower, divorce.

According to Islamic Law puberty is presumed to be attained at the age of 15 years both in the case of males and females. Shia Law, however, presumes the age of puberty in the case of a male to be 15 years and in the case of female puberty is established at the age of 9 years; it begins with menstruation and the presumption is that it begins between 9 and 10 years of age.

2. Age of 21 years : Where ---

(*a*) a guardian of his person or property or of both has been appointed or declared by the Court, or

(*b*) his property has been or shall be assumed by any Court of Wards before the age of 18 years.

3. Age of 18 years : In all other cases.

The following are the persons, in order of preference, legally entitled to the custody of the person of a minor.

Mother : The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues

though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father.

Failing the mother, the custody of a boy under the age of seven years, and a girl who has not attained puberty, belongs to the following female relatives in the order given below :---

(1) mother's mother, howhighsoever ;

(2) father's mother, howhighsoever ;

(3) full sister ;

(4) uterine sister,

(5) consanguine sister;

(6) full sister's daughter ;

(7) uterine sister's daughter ;

(8) consanguine sister's daughter ;

(9) maternal aunt, in like order as sisters ; and

(10) paternal aunt, also in like order as sisters.

A female including the mother, who is otherwise entitled to the custody of a child, loses the right of custody :---

(1) if she marries a person not related to the child within the prohibited degrees, but the right revives on the dissolution of the marriage, by death or divorce ; or

(2) if she goes and resides, during the subsistence of the marriage at a distance from the father's place of residence ; or

(3) if she is leading an immoral life, as where she is a prostitute ; or

(4) if she neglects to take proper care of the child.

In default of the mother and the female relations mentioned above, the custody belongs to the following persons in the order given below :---

(1) the father ;

(2) nearest paternal grand-father ;

(3) full brother ;

(4) consanguine brother ;

(5) full brother's son ;

(6) consanguine brother's son ;

(7) full brother of the father ;

(8) consanguine brother of the father ;

(9) son of father's full brother ;

(10) son of father's consanguine brother :

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her.

If there be none of these, it is for the Court to appoint a guardian of the person of a minor.

The father is entitled to the custody of a boy over seven years of age and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order stated above.

If there be none of these, if is for the Court to appoint a guardian of the person of the minor.

Minor's wish, ascertained in the presence of both parents and minors expressing their wish to put up with father. Court though to be guided generally by what may be conducive to welfare of minor in consonance with minor's personal law yet in determining question of custody, welfare of minor, *held*, paramount consideration. Out of three minors, one girl aged 17 years, one son aged 13½ years and another girl aged 12½ years. Minors aged 17 and 13½ years not subject to right of hizanat of their mother and minor girl aged 12½ years studying in a school and properly looked after by her father. Present environment of girl aged 12½ years not disturbed in circumstances and all minors given in custody of their father. **1980 C L C 851.**

Shia School : According to the Shia School the boy being more than two years old presumption according to Shia Law governing parties : that welfare of minor boy lies in his custody being given to father. Father though having no independent house in Pakistan but allegedly employed at a handsome salary in Great Britain and wishing to take his son to Great Britain for his education. Mother not yet employed and resources of grandmother too meagre for meeting needs of her large number of dependants. Boy's wish not to go with father, not worthy of credit in circumstances. Father though not regularly providing maintenance for child yet such failure in part not rebutting presumption of child's welfare lying is being given in custody of father at his present age. Even otherwise minor, in circumstances of case, likely to fare better in custody of his father. **1979 C L C 4.**

Q. 58. When the right of a female for the custody of a minor is lost ?

Ans. Loss of Right of a Female for the Custody of minor : The right is lost in the following cases :--

(*i*) When she marries a person not related to the child within prohibited degrees, *e.g.*, a stranger but the right revives on death or dissolution of marriage, or

(*ii*) If she goes and resides during the subsistence of marriage at a distance from the father's place of residence, or

(*iii*) If she leads an immoral life as that of a prostitute, or

(*iv*) If she neglects to take proper care of the child.

Q. 59. Who are the Legal guardians of the property of a minor under the Islamic Law ?

Ans. Legal guardians : Following are the persons legally entitled to act as guardian of the property of the minor in order of preference : ---

(*i*) the father ;

(*ii*) the executor appointed by father's will ;

(*iii*) the father's father ;

(*iv*) the executor appointed by the will of the father's father ; and failing all these ;

(*v*) the person appointed by the Court to act as guardian of the minor's property.

Thus there are three kinds of legal guardians of the minor's property :

(1) Natural guardians : These are the father and father's father. The father is the primary natural guardian. If he grows too old and infirm and unable to discharge his duties he may delegate his power to another person to act as the guardian of the minor even *inter vivos*.

(2) Testamentary guardians : These are the executors of the will of the father and father's father. If an executor is appointed generally and not for the particular purpose of looking after the property of the minor, such general executor may appoint his executor to act as guardian of the minor's property.

(3) Guardians appointed by Court : Court appoints guardians of the property in the absence of guardians mentioned above. Their appointment, powers and duties are governed by the Guardian and Wards Act.

Q. 60. What is a 'De facto' guardian ? Has he any right of alienation of immovable property of the minor ?

Ans. 'De facto' guardian : A person may neither be a legal guardian nor a guardian appointed by the Court but may have

voluntarily placed himself in charge of the person and property of a minor. Such a person is called the *de facto* guardian of the person and property of the minor.

Alienation of immovable property : A *de facto* guardian has no power or authority to alienate the immovable property of the minor. Such a transfer is not merely voidable, but void.

Q. 61. What are the restrictions regarding alienations by a legal guardian ?

Ans. Restrictions regarding alienations by a legal guardian : A legal guardian has no power to sell the immovable property of the minor, except in the following cases :--

(*i*) Where he can obtain double its value, or

(*ii*) Where the minor has no other property and the sale is necessary for his maintenance, or

(*iii*) Where there are debts of the deceased and there are no means of paying them, or

(*iv*) Where there are legacies and there are no means of paying them, or

(*v*) Where the expenses exceed the income of the property, or

(*vi*) Where the property is falling in decay, or

(*vii*) When the property has been usurped and there is no chance of fair restitution.

A legal guardian has no power to sell a minor's property unless the property is in a bad state and must be disposed of to avoid loss. If the minor has more than one property there must be justification to sell a particular property. **A I R 1973 Cal. 64.**

The same rules apply to a mortgage and unless it is a case of absolute necessity, it is invalid.

Q. 62. Are there any restrictions on de fecto guardians ?

Ans. Restrictions on de facto guardians : Following are the restrictions on the *de facto* guardians :

(1) He cannot refer any dispute regarding the immovable property of the minor to any arbitration.

(2) He cannot give consent on behalf of the minor so as to validate a bequest to his co-heirs.

(3) He cannot enter into a contract of partnership or to allow the continuance of the partnership business dissolved by the death of the minor's father.

(4) He cannot bind the minor by executing a bond in lieu of his father's debts

Q. 63. Describe the respective Powers of Guardian of persons and of property under the Islamic Law.

Ans. Powers of Guardian of Person : The power of the guardian of person is a mere right of custody of the minor. The guardian of person does not become the guardian for all purposes. The guardianship of the person of the minor vests in order with mother, maternal female relations, paternal female relations, and paternal male relations till the age of 7 in the case of male and till puberty in the case of female infants, under Shia Law, the ages are 2 and 7 respectively. The right of the custody of the mother and the female relations is subject to the supervision of the father which he is entitled to exercise by virtue of his guardianship.

Guardians of Property : Three types of guardians are recognised for the purposes of guardianship of property, namely :

(1) Legal guardians ;

(2) Guardians appointed by Court ; and

(3) *De facto* guardians.

(1) Legal guardians : Under Hanafi Law, following are guardians of minor's property, in order of priority :

(*i*) Father ;

(*ii*) Executor appointed by father's will ;

(*iii*) Father's father ;

(*iv*) Executor appointed by paternal grandfather ; and

(*v*) Executor of the last named executor.

Thus, the only persons who are entitled to appoint a guardian of the property of a minor *by will* are his father and father's father. The mother has no power to appoint *by will* a guardian of the property of her minor child. It must be remembered that mother, brother, uncle, *etc.*, are not legal guardians.

The executor of the father's will, according to Hanafi Law, has preference over the grandfather. In Shia Law, however, some hold that the father cannot appoint an executor in the presence of a grandfather, who will have preference over father's executor in superintending the property. According to another view, the nomination of an executor by the father is valid to the extent of one-third of the property and for the discharge of all rights or claims upon his estate. The power of the executor can be further limited if the executor so desires.

According to Shafii Law, the grandfather has preferential rights over the father's executor in matters of property management.

Immovable properties : Generally, Islamic Law does not allow

legal guardian to alienate immovable properties of a minor. Following exceptions to this general rule, however, are recognised :

(1) Where the sale may fetch double the value of the property ;

(2) Where minor has no other property, and sale is necessary for minor's maintenance ;

(3) Where there are no other means of paying debts of the deceased ;

(4) Where there are no other means of paying legacies (under will) ;

(5) Where the income is less than the expenses of the property ;

(6) Where the property is falling into decay ;

(7) Where the property has been usurped (*i.e.*, wrongfully seized or encroached upon), and the guardian fears that there is no chance of fair restitution.

(2) Guardians appointed by the Court : In the absence of legal guardians, the Court is competent to appoint guardian for the protection and preservation of minor's property

Certified Guardians Movable properties : A guardian of the property of a minor appointed by the Court under the Guardians and Wards Act, 1890, is bound to deal with movable properties as carefully as a man of ordinary prudence would deal with his own property. That is, he may alienate only in cases of grave necessities.

Immovable properties : He cannot alienate immovable property of minor---

(*i*) without the permission of the Court ; and

(*ii*) without necessity or advantage of the minor.

With the prior permission of the Court, he may---

(*i*) mortgage, sell, gift away or exchange the property ;

(*ii*) lease any part of that property for a term exceeding 5 years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

Any alienation in contravention of the above provisions is voidable at the instance of minor or any person affected by such an alienation.

(3) 'De facto' guardians : As we have seen above, the *de jure* guardians are legal guardians and certified guardians. Persons not belonging to these two categories, but who place themselves in the

position of a guardian by intermedling with the property of the minor are chalied *de facto* guardians, for example, mother, uncle

Q. 64. Under what circumstances a guardian appointed by the Court can be removed ?

Ans. Removal of guardian : The Court may, on the application of any person interested, or on its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :---

(1) For abuse of his trust.

(2) For continued failure to perform the duties of his trust.

(3) For incapacity to perform the duties of the trust.

(4) For ill-treatment, or neglect to take proper care of his ward.

(5) For continuous disregard of any provision of the Guardians and Wards Act, or of any order of the Court.

(6) For conviction of an offence implying, in the opinion of the Court, a defect of character, which unfits him to be the guardian of his ward.

(7) For having an interest adverse to the faithful performance of his duties.

(8) For ceasing to reside within the local limits of the jurisdiction of the Court.

(9) In the case of a guardian of the property for bankruptcy or insolvency.

(10) By reason of guardianship of the guardian ceasing or being liable to cease, under the law to which the minor is subject.

Q. 65. What are the rules for alienation of property by guardian appointed by Court ?

Ans. Rules for alienation of property by guardian appointed by Court : He has no power to mortgage, charge, transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, except with the previous permission of the Court.

He cannot lease any part of the immovable property for a term exceeding five years or for any term exceeding more than one year beyond the date on which the ward will cease to be a minor. Permission for the above cannot be given by the Court unless in case of necessity or for an evident advantage to the ward.

Q. 66. Define Hizanat. Can this right be lost ? If so, under what circumstances ?

Ans. Hizanat : Hizanat means custody of a minor, or in other words, the guardianship of the person of a minor.

Loss of Hizanat : The right may be lost under certain circumstances. According to the Islamic Law, the mother loses his right when the male child attains the age of seven years and the girls attain the age of puberty which is fifteen years. But as this rule of Islamic Law is subject to the Indian Majority Act, the right to custody should be deemed to continue till the minor attains the age of 18 years.

A female (including a mother) otherwise entitled to the custody of a child loses the right to the custody--

(*i*) if she marries a person not related to child within the prohibited degrees, but the right revives on dissolution of the marriage by death or divorce ;

(*ii*) if she is 'wicked' as where she is a prostitute or a professional singer, or has committed theft or other criminal offence which make her unworthy to be trusted.

Q. 67. Compare Sunni and Shia Laws relating to Guardianship.

Ans. Comparison of Sunni and Shia law relating to Guardianship--

Sunni Law	Shia Law
1. The mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty.	The mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the above age, the custody belongs to the father.
2. The lawful guardians of minor's property are in order of reference the father; the executor appointed by a will of the father, and after him the guardian appointed by the executor, the father's father: the executor appointed by the father's father's will, and the executor of the last named executor.	If the grandfather is alive he is entitled to the guardianship of the minor's property in preference to the father's executors.

CHAPTER 8

Wills

Q. 68. Define Will and explain the Rules in general relating to Will under the Islamic Law.

Ans. Will : 'Will' is the Anglo-Muslim term for its Arabi equivalent 'Waysiyat'. One of the two authorities on the subject o Wills in Islamic Law defines Will as "Conferment of right of property i a specific thing or in a profit or advantage or in a gratuity to take effec on the death of testators". Thus it should be noted that Will o 'Wasiyat' is the legal declaration of the intention of a testator wit respect to his property which he desires to be carried into effect afte his death. If we break up the definition of Will given by *Fataw Alamgiri*, we let the following elements of Will :---

(1) Will is a conferment of right.

(2) This conferment of right is to take effect after the death o the testator.

According to *Durrul Mukhtar* : "Will is an assignment property to take effect after one's death."

According to *Hedaya* : "*Waseeat* means an endowment wi the property of anything after death as if one person should say another 'give this article of mine, after my death, to a particul person."

Fatawa-Alamgiri defines a Will as the conferment of a right property in a specific thing or in a profit or advantage, in the mann of a gratuity to take effect on the death of the testator.

Tyabji defines "The legal declaration of the intentions of Muslim with respect to his property, which he desires to be carri into effect after his death."

This significance and meaning of the word 'conferment' in t definition is that the conferment must be complete, and should not a mere intention to confer a right of property. The second element the definition denotes the most important characteristic of a Will a that the right conferred in the property is to take effect after the dea of the maker of the Will. *i e.*, testator.

Rules in general relating to Will : Will means disposition property which is to take effect at the time of death of the pers making it.

It may be made orally or in writing. Convenience, howe demands that it should be in writing. If the will is in writing it need be signed ; and if signed, it need not be attested. The only requisit that the intention of the testator should be clear ; thus, a du person, or a person who is unable to speak due to illness, may m

valid wills through gestures. For instance, a sick man is unable to speak from weakness. Another man addresses him and says, "Do you give away one-third of your estate to Z ?" If the sick person gives a clear nod with his head, the will is complete.

A Muslim who is of sound mind and is major can make a will. Although according to Islamic Law majority is dependent upon the age of puberty, which is supposed to be reached at 15 years of age, yet the Majority Act recognizes only the age of 18 years as a requisite for the purposes of will.

A will made by a person after he has taken poison or has done any other act towards the commission of suicide, is not valid. The Shia Law, however, says that if the person made the will and then committed suicide, the bequest would be valid.

A minor may make a will, but its validity would be postponed to the event when, after attaining majority, he ratifies it. Such a will is very weak, as it is open to attacks on the grounds that it has been made under force, coercion or undue influence.

A Muslim cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent there after the death of the testator.

If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate rateably.

A bequest to a person not yet in existence at the testator's death is void ; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the Will.

If the legatee does not survive the testator, the legacy will lapse, and form part of the estate of the testator.

It is not requisite to the validity of a bequest that the thing bequeathed should be in existence at the time of making the Will, it is sufficient if it exists at the time of the testator's death.

A bequest in future is void.

A contingent bequest is void.

A bequest with a condition which derogates from the completeness of the grant takes effect as if no condition was attached to it, for the condition is void.

An alternative bequest is valid.

A bequest may be revoked either expressly or by implication.

A bequest may be revoked by an act which occasions an addition to the subjects of the bequest, or an extinction of the proprietary right of the testator.

A bequest to a person is revoked by a bequest in a subsequent Will of the same property to another. But a subsequent bequest, though it be of the same property, to another person in the same Will, does not operate as a revocation of the prior bequest, and the property will be divided between the two legatees in equal shares.

A Will may, after due proof, be admitted in evidence even though no probate has been obtained.

Q. 69. (*a*) Who can make a will ?

(*b*) Are any formalities necessary to constitute a valid will under the Islamic Law ? Discuss the case on the subject.

Ans. (*a*) Who can make a will : Every Muslim who is of the age of majority and of sound mind is competent to execute a will. For the purposes of will, the age of majority of the testators is determined by the Majority Act, 1875. According to this Act, every minor who has attained the age of 18 years becomes a major unless the superintendence of his property has been assumed by the Court of Wards, in which case a minor becomes a major on completion of 21 years of age and not before. As already said, a minor is incompetent to make a will, but when a will is made by a minor, it may, subsequently, be validated by his ratification on attaining majority. A person cannot be deprived of his power to make a will simply because he has been condemned to death.

Under the Shia Law, a will made by a person who wounds himself mortally, or takes person for committing suicide, is invalid. It is because the law regards the person who has inflicted a fatal wound on himself, as suffering from want of sense, and also because he places himself in the category of a dead man, to whom the provisions as to living persons do no apply.

Will of an Apostate : There is conflict of opinion as to the validity of a will made by a Muslim who renounces Islam afterwards. The Maliki School holds that apostasy invalidates such a will, but according to Hanafis, the will would be effective, if it is lawful according to the sect from which he has apostated.

Will of an insolvent : It is of fundamental importance that the testator should be the proprietor of the subject of the will nor that he should be solvent. If his liability exceeds the assets, the bequest will not be effective unless the creditors discharge the estate from the payment of their debts.

(*b*) Necessary Formalities : Under the Islamic Law, a Will may be made either verbally or in writing. It need not be in writing, nor any particular form is necessary to constitute a will. The only requisite is that intentions are declared with sufficient clearness to be capable of being ascertained. Thus, may unequivocal expression, written or oral will suffice. Even if it is in writing it need not be signed by the testator or attested by witnesses.

Further any property which is capable of being transferred and which exists at the time of the testator's death may be disposed of by a will.

Q. 70. For whom Bequest can be made ?

Ans. Bequest : Bequest can be made for the following persons :

(1) Any person : Any person who is capable of holding property, whether male or female, Muslim or non-Muslim, may validly avail the benefit of a bequest.

(2) Unborn person : Unborn person cannot be a legatee. However, if the lactate is in the womb and the birth takes place within six months from the date of making the will, he can be a lawful legatee. Shia Law recognizes a legatee born within 10 months from the date of will.

(3) Heris : *Heirs* cannot be the legatees, that is, no bequest to heirs, who are entitled to inherit. This rule is relaxed only in cases, where other heirs give their consent (after testator's death, in Hanafi Law ; before or after testator's death, in Shia Law). By giving consent, an heir can bind only his own share but not of others.

It is essential that the heir must be in existence at the time of testator's death.

Consent may be inferred from the conduct of heirs.

Illustrations

(*a*) A Muslim dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an "heir", and a bequest to him will be valid without the assent of the son and the father.

(*b*) A Muslim dies leaving a son, a widow and a grandson by a predeceased son. The grandson is not an heir and a bequest to him is valid to the extent of one-third without the consent of other heirs, *i.e.*, son and widow.

(*c*) *A*, by his will bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will, he is not an "heir" at the death of the testator*, for he is excluded from inheritance by the son.

(*d*) A Muslim leaves him surviving a son and a daughter. To the son he bequeaths three-fourth of his property, and to the daughter one-fourth. If the daughter does not consent

to the disposition, she is entitled to claim a third of the property as her share of the inheritance.

(4) Apostates : Apostates cannot in any case be legatees. A bequest to non-Muslims, however, is valid according to all Schools except Shafei School.

(5) Manslayer : Manslayer is one who kills another person, from whom he intends to take a legacy. Hanafi Law prohibits him to take any interest in the bequest. In *Ithna Ashari* (Shia) Law, however, the more logical view is taken and only intentional homicide leads to exclusion.

(6) Institution : Institutions, whether religious or charitable, can be valid legatees.

Q. 71. What Limitations have been imposed by the Islamic Law on the testamentary powers of a Muslim ? Explain the difference of opinion if any between Shia's and Sunni's on this subject.

Ans. Limitation on testamentary powers : A Muslim cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect unless the heirs consent thereto, after the death of the testator. The limitations imposed by the Islamic Law on the testamentary powers of a Muslim are two-fold :

(1) As to the person to whom the property is bequeathed.

(2) As to the property which is the subject-matter of the bequest.

Limitations as to persons : A bequest to an heir is not valid unless the other heir consents to the bequest after the death of the testator. Such consent under Sunni Law must be given after the testator's death, and under the Shia Law a testator may leave a legacy to an heir so long as it does not exceed 1/3rd of his estate.

Such a legacy is valid without the consent of the other heirs. But if the legacy exceeds 1/3rd, it is not valid unless the other heirs consent thereto ; such consent may be given either before or after the death of the testator. The question as to who are the heirs has reference to the time of the testator's death, and not to the time of the execution of the Will.

Limitation as to property : Where bequest is sought to be made to non-heirs, or even heirs, there is another limitation imposed. This limitation is that a Muslim cannot by Will dispose of more than one-third of his estate which is left after payment of his funeral expenses and debts. Bequests in excess of one-third do not take effect unless the heirs have given their consent to it after the death of the testator. Under Shia Law such consent may be given either before or after the death of the testator.

Difference between Shia and Sunni Law : Shia Law of Wills differs from the Sunni Law in the following :

(1) A bequest to a child in the womb is valid, if it is born in the longest period of gestation, *i.e.*, ten lunar months. It is not necessary as under Sunni Law that child must be born within six months of the date of will.

(2) A legatee who causes death of the testator, is disentitled to take the legacy only if he caused the death intentionally but not if it was by accident.

(3) A testator may leave a legacy to an heir so long as it does not exceed a third of his estate. Such a legacy is valid without the consent of the other heirs.

(4) According to Allahabad High Court a bequest to an heir in excess of the third without the consent of the other heirs is void only if it is a bequest of the whole estate to one heir to the entire exclusion of the other heirs.

The result is that a testator may give even more than a third to an heir provided he leaves something to each of the other heirs.

(5) The consent of the heirs may be given either before or after the death of the testator.

(6) If the bequest exceeds one-third, there is no rateable abatement as under the Sunni Law but the legatees first named take up a limit of the third and the rest take nothing. Thus if a testator bequeaths one-fourth of his estate to A, one-twelfth to B and one-twenty-fourth to C and the heirs refuse to confirm the bequests. A and B would take and C would not take anything as (1/4 + 1/12) the bequests to A and B exhaust the legal third.

(7) The legatee does not survive the testator. The legacy would not lapse in the case of Shias but would pass to the heirs of the legatee. It is only when the legatee has no heirs that the legacy will lapse.

Q. 72. What are the restrictions laid down by Islamic Law on a person desiring to dispose of his properly by will under the Sunni and the Shia Law ?

Ans. Power to dispose of by will ; The power of a Muslim to dispose of his property by will are limited in two ways :--

1. The extent to which he can bequest his property ; and
2. The persons in whose favour the bequest can be made.

1. Testamentary limit as to the extent of the estate : A Muslim cannot dispose of, by will, more than a third of the surplus of his estate after payment of funeral expenses and debts. This limit of

one-third is not laid down in Qur'an ; it is the outcome of a tradition narrated by Abu Vekass. He says :--

> "In the year of the conquest of Mecca, being taken so extremely ill that my wife was despaired of the Prophet of God came to pay me a visit of consolation; I told him that, by the blessing of God, having a great estate but no heir except one daughter, I wished to know if I might dispose of it at all by will." He replied : 'No'. And when I severally interrogated him, 'if might leave two-third or one-half' he also replied in the negative, but when I asked if I might leave a third, he answered, "Yes, you may leave a third, of your property, by will, but a third part to be disposed of by will is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others."

Bequest in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator. If the bequest exceeds the legal third and heirs refuse their consent, the bequest abates rateably.

Under the Shia Law such consent may be given either before or after the death of the testator. Further the Shia Law does not recognise the principles of rateable distribution. Under that law if a testator bequeaths 1/3rd of his estate to A, 1/4th to *B*, and 1/5th to *C* and the heirs refuse to conform the bequests, *A*, the legatee first named, takes 1/3rd and *B* and *C* take nothing. But if instead of 1/3rd 1/12th was given to *A* then *A* would take 1/12th and *B* would take 1/4th but *C* would get nothing as 1/12 + 1/4 exhausts the legal third. But if there are successive bequest of the exact third, to two different persons as, where a testator bequeaths 1/3rd of his property to *A*, and 1/3rd again to *B*. In such a case the latter bequest would be a revocation of the first, so that *B* would take the whole of the 1/3rd, and *A* would take nothing. Also if a will is made of the whole property in favour of a single legatee then no doubt that legatee may claim that he should take 1/3rd of the property. But where there are different objects provided for the document of will there is no rule by which each object should be reduced to 1/3rd of the amount and hence the document does not appear to be valid as a will, *Kaniz Kubra Bibi* v. *Muzaffaruddin Haider*. **1940 A L J 504.**

2. Persons in whose favour the bequest can be made : Testamentary limits as to person fall under the following heads :

(*a*) Bequest to an heir.

(*b*) Bequest to an heir and stranger.

(*c*) Bequest to unborn person.

(*d*) Bequest to a testator's murderer.

(a) Bequest to an heir

(*i*) **Sunni Law :** Under the Sunni Law a bequest in favour of an heir is not valid unless the other heirs consent to it after the death of the testator. The consent during the lifetime of the testator is of no effect because of the traditional saying of the Prophet : "God has allotted to every heir his particular right", and also because a will in favour of some only of the heirs is an injury to the rest. Therefore, if it were deemed legal, it would induce a breach of the ties of the kindred. Further such favouritism would lead to unequal division of property by unreasonably reducing the shares of the neglected and unfortunate heir and would thereby defeat the policy of the Qur'anic injunctions as to division of heritage according to the fixed principles. **1921 Mad. 997.**

If some of the heirs consent, the share of the consenting sharer shall be bound. In determining where a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of death of the testator. The consent need not be express, it may be signified by conduct showing a fixed and unequivocal intention.

(*ii*) **Shia Law :** According to Shia Law a testator may leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of other heirs. But if the legacy exceeds one-third, it is not valid unless the other heirs, consent thereto. Such consent may be given either before or after the death of the testator.

(b) Bequest to an heir and stranger

(*i*) **Sunni Law :** Where under a will a legacy is given to an heir as will as a legacy to a non-heir, the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to the non-heir is valid to the extent of one-third of the property.

(*ii*) **Shia Law :** According to the Shia Law bequests to any of the heirs, payable out of one-third of the estate are valid even without the consent of the other heirs. But a legacy in excess of one-third is not valid without the consent of the heirs. According to the Sharaya-ul-Islam. "a bequest in favour of one's kindred is highly proper they be his heirs or not".

(c) Bequest to unborn person

(*i*) **Sunni Law :** Bequest to an unborn person is void. But a bequest to a child in the womb is valid provided it is born within six months from the date of the will. *Fatwa-i-Alamgiri* and *Hedaya* have laid down that the legatee must be in existence on the date the will is executed.

(*ii*) **Shia Law :** According to the Shia Law a bequest to a child

in the womb is valid if it is born in the longest period in gestation, *i.e.*, ten lunar months. It is necessary that the child must be born within six months from the date of the will. A bequest, therefore, to a person not in existence at the time of the tetator's death is invalid.

(*d*) Bequest to a testator's murderer

(*i*) **Sunni Law** : Bequest to a person who causes the death of the testator whether intentionally or accidentally is void. The Prophet was also of the opinion that there was no legacy for the slayer, he had hastened an event which God might have delayed. The bequest to the murdered is unlawful whether it is made before the mortal wound was inflicted or subsequently. If the heirs assent to the bequest, it is valid according to Abu Hanifa and Mohammad, though not according to Abu Yusuf.

(*ii*) **Shia Law** : A legatee who causes the death of the testator is disentitled to take the legacy only if the death is caused intentionally and not by accident. Such a disqualification is only personal; a bequest in favour of such a legatee's parents, children or any other descendant or ascendant would be lawful.

Q. 73. Is a Will revocable in its nature ? If so, how a Will is revoked under the Islamic Law ?

Ans. Revocation of will : A will is revocable in its nature. It may be revoked at any time, even during *marz-ul-maut*. A bequest may be revoked by the testator either expressly or impliedly, or by a subsequent will.

Express revocation : Express revocation is one where the testator revokes the bequest in express terms either orally or in writing. But a mere denial by the testator that he did not make a will does not act as revocation of an otherwise valid will.

Implied revocation : Implied revocation is one where the testator does an act from which revocation may be inferred.

For example, bequest of a piece of land is revoked, if the testator subsequently builds a house upon it. Similarly, a bequest of piece of copper is revoked, if the testator subsequently converts it into a vessel.

A bequest to a person is revoked by a bequest in a subsequent will of the same property to another person.

Illustrations

(*i*) *A* bequeaths a house to *B*. Subsequently *A* says : "The house that I gave to *B*, is for *C*". This is an express revocation. If *C* is dead at the time of the second bequest, the first bequest remains unaltered.

(*ii*) *A* bequeaths a piece of silver to *B*, and then fashions it into

a ring. According to Abu Hanifa, this is not a revocation, but Abu Yusuf and Imam Mohammad hold it as revocation, and this is correct. (*Tyabji, 816*)

Q. 74. Z, a Muslim, dies leaving a father A, a paternal grandfather B, and a son C. By his will, Z gives 1/3rd of his property to A, 1/3rd to B, 1/3rd for pious purposes. To what extent could these bequests take effect if Z was (*i*) a Sunni Muslim, (*ii*) a Shia Muslim ?

Ans. Here, bequests are made to heirs and non-heirs. B, the grandfather, is excluded from inheritance by the father (A) ; B, is, therefore, a non-heir.

Bequests to non-heirs including the bequests to pious purposes are valid to the extent of 1/3rd of the property. Bequests in excess after the death of the testator if the bequests exceed the legal third, and heirs refuse their consent, the bequests abate rateably under the Sunni Law, therefore, if Z was a Sunni.

(*i*) The bequest to A who is an heir will fail unless the other heir C, consents to it.

(2) The bequest to B (a non-heeir) ; and

(3) The bequest to pious purposes are valid but as they exceed the legal third, they abate rateably if the heirs refuse their consent. Hence both of them are valid to the extent of 1/3rd.

(*ii*) If Z was a Shia, the principle of rateable distribution is not to be applied. Where there are the successive bequests of the exact third, the later bequest would be a revocation of the earlier bequest, so that bequest for pious purposes will take effect to the extent of 1/3rd of property.

CHAPTER 9

Death-Bed Gifts & Acknowledgments

Q. 75. Define "Marz-ul-maut". What is effect of a gift made during Marz-ul-maut ?

Ans. Marz-ul-maut : Arabic equivalent for death-illness is '*marz-ul-maut*', which is made up of two words : (1) marz, and (2) maut. When a person suffering from a 'marz' (malady or illness) is under the apprehension of 'maut' (death) he is said to be suffering from '*marz-ul-maut*' or death-illness.

The best and most accepted definition death-illness is given by Baillie. According to him it is an illness "which is highly probable, will ensue fatally".

A *marz-ul-maut* is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death.

It is an essential condition of *marz-ul-maut*, that is, death-illness, that the person suffering from the *marz-ul-maut* be under an apprehension of maut, *i.e.*, death. Where the malady is of long continuance and there is no immediate apprehension of death, the malady is not *marz-ul-maut* ; but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and does in fact result in death.

To constitute a malady *marz-ul-maut*, there must be :

(1) proximate danger of death, so that there is a preponderance of apprehension of death ;

(2) some degree of subjective apprehension of death in the mind of the sick person ; and

(3) some external indications, chief among which would be inability to attend to ordinary avocations, although his attending the ordinary avocations does not conclusively prove that he was not suffering from *marz-ul-maut*.

Effect of gift made at the time of marz-ul-maut : A gift made during *marz-ul-maut* cannot take effect beyond one-third estate of the donor, after paying funeral expenses and debts, unless the heirs give their consent, after the donor's death. Nor such a gift can take effect, if made in favour of an heir, unless the other heirs give their consent, after the donor's death.

A gift in death-illness takes place only when the donor dies. Such a gift is subject to all the conditions necessary for the validity of a simple gift, including delivery of possession by the donor to the donee.

If the gift was made under pressure, what the Privy Council described as "pressure of the sense of the imminence of death" then the gift would be hit by doctrine of *marz-ul-maut*. The same criterion was accepted by the Supreme Court. Both these precedent cases set out the following factors which the Court should consider to sustain the conclusion that the impugned transaction was made under such pressure :

(*i*) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death ?

(*ii*) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death ?

(*iii*) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations--a circumstance which might create in the mind of the sufferer an apprehension of death ?

(*iv*) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom sufferer to malady. **P L D 1977 SC 28.**

A gift made by a Muslim during *marz-ul-maut* or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect ; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death.

A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a *hiba* or gift, including delivery of possession by the donor to the donee.

Q. 76 What are the conditions necessary for constituting a particular illness marz-ul-maut ? Discuss with reference to case-law.

Ans. What constitutes marz-ul-maut : In order to consti-tute *marz-ul-maut* the following conditions are necessary :

(1) There must be a proximate danger of death so that there is a preponderance (*ghaliba*) of apprehension (khauf) of death.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person-some pressure of the sense of imminence of death.

(3) There must be some external *indicia* the chief among them being the inability to attend to ordinary vocations or to stand up to say prayers.

An illness is *marz-ul-maut* when--

(1) The donor is suffering from a disease at the time of the gift which is the immediate cause of his death.

(2) The disease is of such nature or character as to induce in the person suffering the belief that death would be caused thereby, or to endanger in him the apprehension of death.

(3) The illness is such as to incapacitate him from the pursuit of his ordinary avocations, that is, standing up for prayers, which may create in the mind of the sufferer an apprehension of death.

(4) The illness after long continuance has taken such a serious turn as to cause an apprehension of death ; but not if he is accustomed to the malady.

Doctrine of *marz-ul-maut* applies to cases where the gift is made under pressure of a sense imminence of death. The essential condition thus for its application is that there must be a subjective feeling in the mind of the patient, that he is not goving to recover; in other words there must be a proximate danger of death resulting subjectively in the preponderance of apprehension. These facts have to be proved like any other fact and may be evidenced by some external, indicia in the patient's condition or his expressions and declarations.

Where the evidence is to the effect that the donor did not despair of his life at any time much less at the time when the deed of *waqf* was executed, the doctrine of *marz-ul-maut* does not apply. Therefore, *marz-ul-maut* or death illness is an illness which induces an apprehension of death, in the near future, in the person concerned and which actually results in his death.

A death illness is one which, it is highly probable, will end fatally.--

(*a*) whether the sick person has taken to his bed or not, or

(*b*) where it disables him from rising for necessary avocations or not :

and it actually ends fatally.

The crucial test of *marz-ul-maut* is the subjective apprehension of the death in the mind of the donor, that is to say, the apprehension derived from his own consciousness, as distinguished from the apprehension caused in the minds of others and the other symptoms, physical incapacities, are only the indicia but not infallible signs or a *sine qua non* of *marz-ul-maut*. **A I R 1945 Bom. 438.**

The importance of the subjective element is to be found developed in the texts set out by Mohammad Yusuf in his Tagore Law

Lectures on Marriage, Dower and Divorce, Vol. III, paras 2919-2924, 2945-2947. This view, however, has been repudiated by Sir Abdur Rahim, in his Tagore Law Lectures on Mohamedan jurisprudence.

Death illness or what is technically termed as *marz-ul-maut* under the Islamic Law is one which it is highly probable will issue fatally. If at the date of the disposition, therefore, the donor was suffering an illness which results in his death or which is the immediate cause of his death and he was under an apprehension or belief of imminent death the disposition will be subject to the limitations detailed hereunder. The duration of the illness or the external indicia of such illness, such as the physical incapacity of the donor to attend to ordinary avocations would be material only for determining the degree of the illness and the question of probability of a belief in imminent death.

Consumption in advanced stages in regarded as constituting death illness. The incapacity of pious Muslim to offer prayers standing has been regarded as an illustration of external indicia of death illness. The question of mental alertness is not of very much help in determining whether a person is going to die or not.

Shia Law : The Shia Law as to what constitutes death illness is the same except that child birth is not by itself treated as death-illness.

Q. 77. What is effect of Acknowledgment of a debt made during 'marz-ul-maut' ?

Ans. Acknowledgment of debt during marz-ul-maut : An acknowledgment of a debt may be made as well during death-illness as "in health".

When the only proof of a debt is an acknowledgment made during *marz-ul-maut* or death-illness, the debt must not be paid until after payment of debts acknowledged by the deceased while he was in health" and of debts proved by other evidence. An cknowledgment of a debt made during death-illness in favour of an eir is no proof at all of the debt, and no effect can be given to it.

It may be seen that an acknowledgment of a debt does not tand on the same footing when it is made during *marz-ul-maut*. The rinciple on which the rule is based is obvious. An acknowledgment f debt made at such a time may not be true. The person making it ay want to give something to somebody which he may not be able give as a gift or will and may try to achieve his object by making an cknowledgment. This is why this rule has been made.

Q. 78. How is a gift affected by the doctrine of marz-ul-aut ?

Ans. A Muslim has unlimited powers to dispose of his property / way of gift, but the law has imposed restrictions on the donor's ower to dispose of his property by a gift during *marz-ul-maut*.

A death-bed gift--

(a) when made to a non-heir, cannot operate on more than a third of the testator's estate after payment of funeral expenses and debts, unless his heirs give their consent after the death of the donor, to the excess taking effect. If they do not consent, the gift take effect only in respect of a third of the donor's estate.

(b) when made to an heir, is altogether invalid, unless the other heirs consent thereto.

Similarly a *wakf* made in death illness is valid only to the extent of a third of the net estate left by the deceased unless the heirs consent. The substance of the matter is that a Muslim who is in *marz-ul-maut* or death illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a *wakf* in such illness, unless his heirs assent, the *wakf* will affect only one-third of his estate and will be invalid in respect of the excess; and it is important to add that this principle operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated *mutwalli*.

Under the Shia Law, death-bed gift to an heir holds good to the extent of only one-third of the donor's estate without the consent of the others in spite of delivery of possession prior to his death. But if it exceeds one-third, it is not valid unless the heirs consent thereto.

If the donor dies of a disease of more than one year's duration the disease is not considered death illness. But there is condition attached to it that if the illness increases to such an extent to give an apprehension of death in the mind of the donor it becomes a death-illness. The nature of the gift does not change even if the donor had intended prior to death illness to transfer the property to donee.

According to Dr. Jung a gift made during illness would be valid to the whole extent if the donor recovers his health, and even in cases of prolonged illness which had continued for more than a year provided the gift was made after one year, and before the donor had become absolutely bed-ridden in a state of dying.

In order to invalidate a gift on the ground that it is a death-bed gift, it must have been made "under pressure of the sense of the imminence of death". The burden of proving this is on those who attack the gift on that ground.

Q. 79. Enumerate the chief points of difference between an illness constituting marz-ul-maut and donatio mortis causa.

Ans. Difference between marz-ul-maut and donatio mortis causa : The *donatio mortis causa* as embodied in Section 191 of the Succession Act, 1925 differs from the gift made during *marz-ul-maut* in that under the former only movable property can form the subject

of gift but in the latter may be any property movable or immovable. Further, in *donatio mortis causa* no limitations are placed either as regards the persons to whom or the extent to which property can be disposed of but in death-bed gift under Islamic Law a bequest cannot operate on more than a third of the testator's net assets unless with the consent of all the heirs, nor in favour of one heir without the consent of all the others. Again, in case of *donatio mortis causa* if the donor recovers from sickness the gift entirely fails, but under the Islamic Law a gift made during illness would be valid to the whole extent if the donor subsequently recovers.

Q. 80. How are a Waqf and sale affected by the doctrine of marz-ul-maut ?

Ans. Waqf on death-bed : A *waqf* made in death-illness is like a gift made without consideration and is valid only to the extent of the legal-third unless the heirs consent to it The Shia Law is also the same, and a *waqf* made in death-illness is valid to the extent of one-third if not assented to by the heirs, even if possession has been delivered by *wakif*. As a donor suffering from death-illness has a short time to live his disposition can come into actual operation after his death and is for practical purposes a will

Effect on sale : The doctrine of *marz-ul-maut* hold good in transactions or transfers which are without consideration. Accordingly sale or other transactions for consideration are beyond that provisions of the doctrine of *marz-ul-maut*. **40 All. 238.**

Q. 81. Explain briefly the acknowledgment of a debt during marz-ul-maut.

Ans. Acknowledgment of debt : Death-bed acknowledgment of a debt :--

(1) In favour of an heir is of no validity if the only proof of a debt is an acknowledgment made during *marz-ul-maut*.

(2) In favour of a non-heir, if the only proof of a debt is an acknowledgment made during *marz-ul-maut*, the debt must not be paid until all the debts acknowledged by the deceased while he was in good health have been paid and debts proved by other evidence.

CHAPTER 10

Gifts

Q. 82. Define Gift and state its kinds recognised by the Islamic Law ? What are the distinguishing features between a 'Sadaqa' and 'Hiba' ?

Ans. Gift : A 'Hiba' or a simple gift *inter vivos* (between living persons) has been variously defined. Literally it means 'the donation of a thing from which the donee may derive benefit.' In its technical sense it is defined as "an unconditional transfer of property, made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter." It is the conferring of the property without consideration.

Ballie has defined it as the conferring of a right of property in something specific without any exchange. Juristically it is treated as a contract consisting of a proposal or offer on the part of the donor to give a thing and the acceptance of it by the donee.

Abdur Rahim : "A transfer of a determinate property (*mal*) without an exchange. Juristically it is treated as consisting of proposal or offer on part of the donor to give a thing and of acceptance of it by the donee. Until cceptance, the gift has no operation."

Mulla : "Gift is a transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter."

Fyzee : According to Fyzee "Hiba is the immediate and unqualified transfer of the corpus of the property without any return."

Kinds of gifts : Following are the kinds of gifts recognised by Islamic Law ---

(1) **Hiba :** Hiba or gift pure and simple is the immediate and unqualified transfer of the corpus of the property without any return. Since it is a transfer of the corpus of the property. It is essential to the validity of Hiba that there should be such transfer as the property is capable of delivery of possession.

(2) **Hiba-bil-iwaz :** Hiba-bil-iwaz is to be contrasted with Hiba inasmuch as while Hiba-bil-iwaz is transfer or gift made for a consideration and this consideration is called the iwaz and whereas the Hiba is gift pure and simple without any exchange or consideration being passed for it to the donor. Hiba-bil-iwaz therefore acquires the character of a sale. In fact it has been held to be a reality and has also been held to possess all the incidents of a contract of sale. The ,waz forms the consideration and is a necessary part of Hiba-bil-iwaz. The adequacy of consideration is not material. What is material is that it must be actually and *bona fide* paid. It is not necessary that payment should be immediate. It may be made even

subsequently provided it is offered and accepted as an iwaz of the gift already made.

According to the case of *Fazal Ahmad* v. *Rakhi*, **P L D 1958 Lah. 218,** *hiba-bil-iwaz* is of two kinds : The first is one in which a return is stipulated and it is called *hiba-ba-shart-ul-iwaz*. The second kind is one in which the return is subsequent and not stipulated is a *hiba-bil-iwaz*. The difference between a *hiba-ba-shart-ul-iwaz* and a sale is one of form. So far as *hiba-ba-shart-ul-iwaz* is concerned, it is till its completion a gift. On completion only it becomes a sale and, therefore the Islamic Law applies to it till it is completed.

According to the case of *Wilayat Jan* v. *Muhammad Sharif*, **1985 S C M R 1191**, Hiba-bil-Iwaz is distinguishable from a simple gift as the former is a gift for consideration. It is in reality, a sale and has all the incidents of a contract of sale. Two conditions, however, must concur to make the transaction valid namely (1) actual payment of consideration (Iwaz) on the part of the donee, and (2) a *bona fide* intention on the part of the donor to divest himself in *praesenti* of the property and to confer it upon the donee. The adequacy of consideration is not material.

(3) **Hiba-ba-shart-ul-iwaz :** Where a gift is made with a condition for a return it is called Hiba-ba-shart-ul-iwaz. As in the case of Hiba so also in the case of Hiba-ba-shart-ul-iwaz delivery of possession is necessary to validate the gift.

According to the case of *Shamasunissa Bibi* v. *Abdul Ghafoor*, **P L D 1964 Dacca 451,** Hiba-ba-shart-ul-iwaz is a gift made with a stipulation for return. In this form of hiba too, there are two separate acts of donation, but the main distinction between hiba-bil-iwaz and hiba-ba-shartul-iwaz is that in the former the iwaz is voluntarily offered by the donee after the completion of primary gift, while in the latter the iwaz is expressly stipulated for between the parties at the time of the primary gift.

(4) Areeat : It is the grant of a licence to enjoy certain property.

(5) Sadaqah : A sadaqah is a gift made with a religious object, in other words, with the object of acquiring religious merit. A hiba, on the other hand, is a gift made with secular object. A sadaqah when once completed by delivery is not revocable but a hiba is always revocable though subject to certain exceptions. A hiba cannot be made to two or more persons jointly but a sadaqah can be so made, for it is made out of charity.

Principles enunciated by Tradition : When the intention of the owner is to give the corpus of and an absolute interest in the property transferred by gift or amree with a reversion of a limited estate in the same property in favour of another, law defeats not the grant but the condition. If the manifest intention is not to give the corpus to grant an absolute interest in the property but is only to grant a licence, a right

of residence, a right of enjoyment of income, for example, for life or another period of time or subject to revocation, the grant as well as the conditions are valid. **1979 C L C 587.**

Q. 83. What are essentials of a Valid Gift under Islamic Law ?

Ans. Essential of valid gift : Writing and registration is not necessary for the validity of a gift. It may be oral or in writing. In a recent case, **A I R 1972 Pat. 279,** the validity of the oral gift has been upheld. It was observed that the Islamic Law "permits an oral gift, but to make a gift valid the following three essentials must co-exist :

(*i*) a declaration of gift by the donor,

(*ii*) acceptance of the gift express or implied, by or on behalf of the donee, and

(*iii*) delivery of possession of the subject of the gift by the donor to the donee. Delivery of possession need not in all cases be actual. It should be delivery of such possession as the subject of the gift is susceptible."

Thus the three essentials of a gift are :

(*i*) Declaration of the gift by the donor ;

(*ii*) Acceptance of the gift, expressly or impliedly, by or on behalf of the donee ; and

(*iii*) Delivery of possession of the subject-matter of the gift to the donee.

If any of the above conditions is missing, the gift is not complete.

(*i*) **Declaration :** Declaration does not mean simply an announcement of the gift but it also entails that the donor should have a real intention of making the gift. Tyabji says : "Where there is no real and *bona fide* intention to transfer the ownership of the subject of gift, an alleged gift may be of no effect." Gifts without intention may be Sham gifts, colourable or benami transactions, *etc.*

(*ii*) **Acceptance :** The donee must accept the gift. This acceptance may be express or implied (that is, by conduct). But the gift of a debt to a debtor or his heir is valid without acceptance and is not invalidated by his rejection. For example, *A* owes Rs. 100/= to *B*. *B* makes a gift of this debt of Rs. 100/= to *A*, which *A* does not accept and insists on paying the money to *B*. The gift shall, however, by valid and effective even on *A's* refusal to accept it.

(*iii*) **Delivery of possession :** When the donor makes a declaration of a gift and the donee accepts, then the possession of the thing gifted should also be given to the donee. Such delivery of possession may be actual or constructive.

In case there are more donees than one, possession by one co-sharer is presumed to be in the name and on behalf of other co-sharers. If the co-sharer does not admit claim of a person believing that the real co-sharer is someone else, then he cannot be held to put up an adverse claim to the whole of the gift property, excluding the claim of any other co-sharer. He should be considered as only expressing his doubt about the title of a particular co-sharer.

Registration of gift-deed could not in any way do away with the need of the delivery of possession. Thus, for example, where *A* makes a gift of a house belonging to him in favour of *B*, through a registered deed, but does not deliver the possession to *B*, the gift is incomplete, and therefore void.

The delivery of possession does not mean that the donor must have physical possession of the property and must hand over that physical possession to the donee. It is enough if he has got legal possession as the matter is susceptible of.

Thus, if *A* makes a gift of the corpus of a property to *B*, but reserves the usufruct to himself and continues in physical possession of the property, the payment by *B* of Government revenue after the date of the gift in respect of the property, amounts to constructive possession of the property by *B*, and the gift is complete and valid.

Or, if *A* makes a gift of the corpus of a property to *B*, but reserves the usufruct to himself and continues in physical possession of the property, the payment by *B* of Government revenue after the date of the gift in respect of the property, amounts to constructive possession of the property by *B*, and the gift is complete and valid.

Or, if *A* makes a gift to *B* of his landlord rights over lands in the occupation of tenants, the gift is complete as soon as the tenants, by direction of *A*, have paid, or undertaken to pay, rents to *B*.

Or, where *A* makes a gift to *B* of a promissory-note which becomes payable on delivery and endorsement, the gift is complete as soon as the note has been endorsed and delivered to the donee.

Or, *A*, having a deposit account at a bank, hands over to *B* the bank's receipt for the same, saying, "After taking a bath I will go to the bank and transfer the papers to your name". *A* dies before accomplishing his promise. This is not a valid gift of *A's* claim upon the bank, and *B* takes nothing by it.

Q. 84. What are the different modes of delivery of possession under Islamic Law of gifts ?

Ans. Modes of delivery of Possession : (1) As regards movable property the gift is not complete unless the property has been actually delivered.

(2) In the case of immovable property--

(a) Where the donor is in possession, a gift is not complete unless the donor physically departs from the premises with all his goods and chattels and the donee formally enters into possession.

(b) Where the property is in occupation of the tenants a request by the donor to the tenants to attorn to the donee or by delivery of the title deed or by mutation in Revenue Register.

(c) Where the donor and donee both reside in the property, in such a case no physical departure or formal entry is necessary. In this case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. **(1884) 9 Bom. 146.**

(3) In the case of gift of immovable property by husband to wife-it is not necessary for the husband to depart even temporarily provided it can be inferred from the surrounding circumstances that he had real and *bona fide* intention to make the gift.

(4) In the case of gift by the father or other guardian to a minor or a lunatic, the declaration of gift is sufficient to change the possession of the father or other guardian on his own account into possession in the minor's account.

(5) Where the subject-matter of a gift consists of shares in Zamindari villages and parcels of land in the case of which physical possession is impossible the gift may be completed by mutation of names and transfer of rents and incomes arising out from the property. Actual possession is not necessary where the property gifted is not capable of being possessed physically.

(6) In the case of incorporeal property and actionable claims, the gift may be complete by any act on the part of the donor showing a clear intention on his part to divest himself *in praesenti* of the property and to confer it upon the donee.

(7) Where the subject of gift is already in possession of the donee as bailee the gift may be completed by declaration and acceptance without formal delivery of possession.

Q. 85. Are the following gifts valid :--

(a) Gift of an actionable claim and incorporeal property.

(b) Gift of equity of redemption.

(c) Gift of property held adversely to the donor.

(d) Gift of property not actually in existence at the time when the gift was made.

(e) Gift of a debt.

(f) Gift of life-interest ?

Ans. (a) Actionable Claims : Actionable claims and incorporeal property may form the subject of a gift. In such cases the gift may be completed by any appropriate method of transferring all the control, the nature of the property, admits of and by the donor divesting himself of all his rights in the property. Thus a gift of Government Promissory Notes may be completed by endorsement and delivery to the donee. But where the husband handed over a bank receipt (not transferable) in respect of money to his wife saying: "After taking a bath, I will go to bank and transfer the papers to your name" but he died before the transfer; it was held that the gift was not complete as the donor's right to receive the money from the bank could not be transferred by a mere delivery of the receipt. **(1897) 25 Cal. 9, 17.** In *Anwari Begum* v. *Nijam Uddin Shah,* **21 All. 165, 170-171,** their Lordships of the Allahabad High Court remarked :

"There is no doubt that the principle of Islamic Law is that possession is necessary to make a good gift, but the question is possession of what ? If a donor does not transfer to the donee so far as he can, all the possession which he can transfer, the gift is not a good one. There is, in our judgment, nothing in the Islamic Law to prevent the gift of right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely such right as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely the *corpus* of the property. He must evidence the reality of the gift by divesting himself so far as he can, of the whole what he gives."

Note : For the definition of the term 'Actionable claim', see any book on the Transfer of Property Act.

(b) Equity of Redemption : A gift may be made by a mortgagor of his equity of redemption. But there is a conflict of opinions whether a gift of an equity of redemption, where the mortgagee is in possession of the mortgaged property at the date of the gift, is valid. The Bombay High Court is of the view that it is not valid, whereas the Calcutta High Court holds it as valid.

The ground on which the decision of the Bombay High Court is based is that the delivery of possession by the donor to the donee is a condition essential to the validity of the gift. Therefore, when the mortgagee is not in possession of the mortgaged property, a gift of equity of redemption is not valid unless the mortgagor delivers possession of the property to the donee.

Sir D.F. Mulla critically examines the opinion held by High Court of Bombay and observes :

"It is true that delivery of possession by the donor to the donee is necessary to validate a gift. But it is equally well established

that when the subject of a gift is not capable of actual possession, the gift may be perfected by appropriate act on the part of the donee which may have the effect of transferring the ownership to the donee. When the mortgagor himself is in possession of the mortgaged property, a gift of the equity redemption is not valid, unless he delivers possession of the property to the donee. But where the mortgagee is in possession, the mortgagor cannot deliver possession to the donee, and the gift, it is submitted, may in that event, be completed by some other appropriate method."

The High Court of Allahabad also supports the view expressed by the High Court of Calcutta. Thus it can be safely said that the view expressed by the High Court of Bombay is not correct.

(*c*) **Property held adversely to the donor :** A gift of property held adversely to the donor is not valid, unless the donor obtains and delivers possession of it to the donee. But when a gift is public and authorises the donee to take possession which is in fact taken subsequently, the gift is not invalid, because the donor was not in possession of the subject of the gift at the time of donation. **(1888) 10 Cal. 684, 701-702, 15 I A 81.** On the basis of this observation, it has been held that a gift of immovable property by a purchaser at a sale in execution of a decree, though made before confirmation of the sale and before acquisition of possession by him is valid, if the donee is auhthorised by the donor to obtain possession.

(*d*) **Property not actually in existence :** A gift of property not actually in existence at the time of the gift is void.

(*e*) **Gift of a debt :** The gift of a debt in favour of the debtor as well as to another person is valid. Such a gift to the debtor is valid without his consent, but becomes inoperative if it is refused by the debtor. Under the Shia Law, however, there is a divergence of opinion as regards gifts in favour of a person other than the debtor. The *Sharaya-ul-Islam* says that a gift to a person other than the debtor is void because it is unaccompanied by delivery of possession. But other Shia authorities hold it as valid.

(*f*) **Gift of a life-interest :** A gift of a life-interest is valid. Under the Sunni Law a gift to a life-interest in property did confer an absolute estate in the *corpus*. The rule in based on a passage in the *Hedaya* which says that, where there is a gift followed by a condition repugnant to the gift, the gift remains, and the condition is rejected.

Q. 86. In whose favour Gift may be made ?

Ans. A gift may be made in favour of the following :

(1) **Any living person who is capable of holding property ;** Thus, strictly speaking, a gift to an unborn person is invalid. Take the example of *A*, who makes a gift to *B*, and after *B's*

death, to his male heirs. *B* has got no male heirs at the time of the gift. The gift is invalid.

(2) **Child in the womb :** A gift to an unborn person may be made provided the child is born within six months from the date of the gift, because, in that case, it is presumed that the child was actually existing as a distinct entity in the womb.

(3) **Unborn person :** A gift of a limited interest in the usufruct to property (*ariat*) may be made to an unborn person provided that such person is in existence when the interest opens out for him. Thus, if a life-interest is granted to *A* and thereafter to *B* it is sufficient if *B* is in existence at the death of *A* ; notwithstanding the fact that at the time of making the gift, *B* was non-existent.

(4) **Juristic persons :** Gifts may be made validly to such juristic persons as mosques, *dargahs*, and charitable institutions like schools.

(5) **Non-Muslims :** A gift may be made to a non-Muslim. The gift property will be subject to the personal law of the donee, once he gets possession of it.

(6) **Two or more persons :** Where a gift is made to two or more donees without dividing the property, its validity is governed by the provisions of the doctrine of *Musha* (discussed later on in this Chapter).

Q. 87. What do you understand by term Musha ?

Ans. Musha : *Musha* has been defined as an undivided share in an immovable or movable property.

As delivery of possession is one of the essentials of a valid gift, thus the possession to be delivered must be separate and exclusive. Hence, gift of an undivided share (*musha*) in a thing capable of division is void, according to Hanafi Law. According to Shafei and Shiite view, however, the gift of *musha* is valid, provided that the donor, after withdrawing his control from the subject-matter of gift, delivers it to the donee.

Musha (literal meaning : confusion) in law denotes the mixing up of the proprietary rights of more than one person in a thing (as in joint ownership), where each co-owner has a right until partition of the property.

Musha may be of two types : those joint properties which are indivisible, and those divisible.

Where property is indivisible : A gift may be validly made of an undivided share (*musha*) in a property which is incapable of being divided ; or where the property can be used to better advantage in an undivided condition.

Such indivisible things may be a staircase, small house or small bath. Thus, *A*, who owns a house, makes a gift to *B* of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The Gift of *A's* undivided share in the use of the staircase is not capable of division ; therefore it is valid. And a gift of a share in the business of a Turkish bath is valid, for the bath is not capable of division and would be ruined if it were divided by metes and bounds.

Where property is divisible : The gift of *musha* of a property which is capable of being divided is irregular but not void. Subsequent division and delivery of possession renders the gift as valid.

A, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to *B*." (*Mulla*, *148*).

Exceptions : There are six exceptions to this general rule. (*Mulla*, *147*).

Exception I : Where the gift is made by one co-heir to another : For example, a Muslim woman dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter.

Exception II : Where the gift is of a share in a *Zamindari* or taluka. For instance, *A*, *B* and *C* are co-sharers in a certain *Zamindari*. Each share is separately assessed by the Government, and has a separate number in the Collector's book, and the proprietor of each share is entitled to collect a definite share of rents from the *Zamindari*. A makes a gift of his share to *Z* without a partition of the *Zamindari*. The gift is valid, for it is not a gift strictly of *musha*, the share being definite and marked off from the rest of the property.

Exception III : When the gift is to two or more persons. *X* makes a gift of a house to *A* and *B* in equal shares as tenants-in-common. The property is not divided off although their shares are clearly defined, possession of their specific shares is not given to *A* and *B*. The gift is valid.

Exception IV : Where the gift is of a share in freehold property in a large commercial town. Thus, where *A*, who owns a house in Bombay makes a gift of a third of the house to *B*, the gift is valid, because the property is situated in a large commercial town.

Exception V : Where the gift is of shares in a Land Company.

Exception VI : Where a property is gifted out absolutely to a person with a condition that he shall make certain periodical

payments out of the recurring income of the property, such payments are not governed by the doctrine of *musha*.

Q. 88. Discuss and illustrate :

(1) Conditional gift. (2) Contingent gift.

Ans. (1) Conditional gift : A gift which is made subject to a condition is called a conditional gift. If the condition is such which derogates from the completeness of the grant, the condition is void and the gift will take effect as if there were no condition.

Illustrations

(*i*) *A* makes a gift of his house to *B* to take effect on *B's* marrying *C*. The gift is void.

(*ii*) A gift by a Shia Muslim to *A* for life and in the event of death of *A* without leaving a male issue, to *B*, is as regards, *B* a contingent gift and therefore void.

(*iii*) *X* makes a gift of promissory-notes to *Y* on condition that *Y* should return a fourth part of the notes to *X* after a month. Here the condition relates to the return of part of the corpus and therefore derogates from the completeness of the grant. The condition is therefore void and *Y* takes the notes absolutely.

(2) Contingent gift : A gift which is made to take effect on the happening of a certain event is called a contingent gift. Such gift cannot be made and is void.

Illustrations

(*i*) *A* makes a gift of a certain property to *B* with a condition that *B* shall not transfer the property. The restraint against alienation is void and B takes the property absolutely.

(*ii*) *A* makes to B a gift of a cow attaching the condition that he shall not sell the milk. The condition is void.

(*iii*) *A* makes a gift to *B* to take effect on *B's* marrying *C*. The gift is void.

Q. 89. Define and distinction between the kinds of Hiba.

Ans. Hiba : There are two ways of making a gift of property to another and both these are recognised as lawful under the Islamic Law. The first is a gift *'inter vivos'*, *i.e.*, during lifetime and the second is by a will, *i.e.*, after death.

Kinds of hiba : Following are the kinds of hiba :

(*a*) **Hiba :** Hiba or gift pure and simple is the immediate and unqualified transfer of the corpus of the property without any return. Since it is a transfer of the corpus of the property. It is essential to the validity of Hiba that there should be such transfer as the property is capable of delivery of possession.

(*b*) **Hiba-bil-iwaz** : Hiba-bil-iwaz is to be contrasted with Hiba inasmuch as while Hiba-bil-iwaz is transfer or gift made for a consideration and this consideration is called the iwaz and whereas the Hiba is gift pure and simple without any exchange or consideration being passed for it to the donor. Hiba-bil-iwaz therefore acquires the character of a sale. In fact it has been held to be a reality and has also been held to possess all the incidents of a contract of sale. The iwaz forms the consideration and is a necessary part of Hiba-bil-iwaz. The adequacy of consideration is not material. What is material is that it must be actually and *bona fide* paid. It is not necessary that payment should be immediate. It may be made even subsequently provided it is offered and accepted as an iwaz of the gift already made.

According to the case of *Wilayat Jan* v. *Muhammad Sharif*, **1985 S C M R 1191**, *Hiba-bil-Iwaz* is distinguishable from a simple gift as the former is a gift for consideration. It is in reality, a sale and has all the incidents of a contract of sale. Two conditions, however, must concur to make the transaction valid namely (1) actual payment of consideration (Iwaz) on the part of the donee, and (2) a *bona fide* intention on the part of the donor to divest himself in *praesenti* of the property and to confer it upon the donee. The adequacy of consideration is not material.

(*c*) **Hiba-ba shart-ul-iwaz** : Where a gift is made with a condition for a return it is called Hiba-ba shart-ul-iwaz. As in the case of Hiba so also in the case of Hiba-ba shart-ul-iwaz delivery of possession is necessary to validate the gift.

According to the case of *Shamasunissa Bibi* v. *Abdul Ghafoor*, **P L D 1964 Dacca 451,** Hiba-ba shart-ul-iwaz is a gift made with a stipulation for return. In this form of hiba too, there are two separate acts of donation, but the main distinction between *hiba-bil-iwaz* and hiba-ba-shartul-iwaz is that in the former the iwaz is voluntarily offered by the donee after the completion of primary gift, while in the latter the iwaz is expressly stipulated for between the parties at the time of the primary gift.

Q. 90. What is the difference between :

(1) **Gift and Areeat.**

(2) **Hiba and Sadaqah ?**

Ans. (1) Difference between Gift and Areeat : Areeat in Islamic Law has many peculiarities, which distinguish it from Hiba and makes it an institution by itself. In the words of Hedaya, Areeat "signifies an investiture with the use of a thing without a return", and Koorokhee and Shafei define it, "simply, a licence to use the property of another". Further, Areeat is resumable at pleasure of the licensor. Another remarkable feature of Areeat is that the borrower cannot let out the thing given to him under the licence. Furthermore, if the land

has been borrowed for the purpose of building and plantation, the lender is at liberty to resume it.

According to Syed Ameer Ali, the grant of the usufruct for a limited time, without consideration and resumable at will, is called Areeat (Commodatum). The author defines Areeat as "constituting person, the owner of the usufruct of a property without consideration. This may here be added, that concluding his discussion on Areeat Syed Ameer Ali has observed: "The rules relating to the liability of a person who has taken a thing on Areeat, and other matters connected therewith, are minutely laid down in the *Fatawa-i-Alamgiri*, but it is unnecessary to go into them here, as the Contract Act is applicable to all those questions".

Gift under Islamic Law is a transfer of the property by one person to another, made immediately and without any exchange and accepted by or on behalf of the latter, whereas Areeat, is transfer of some limited interest in the benefits, produce, profits or usufruct of a property for a limited period. In other words, a Hiba is a transfer of ownership without consideration and an Areeat is not a transfer of ownership but a temporary licence to enjoy the profits so long as the grantor pleases and is defined by the author of Durrul Mukhtar as making another the owner of the usufruct without any consideration. **P L D 1975 Lah. 1484.**

(2) Difference between Hiba and Sadaqah : The distinction between hiba and sadaqah lies in the object with which it is made. In the case of hiba, the object is to manifest affection towards the donee, or to win his regard or esteem; in the case of sadaqah, the object is "to acquire merit in the sight of the Lord". A gift of property even to the rich would be a sadaqah if made with the object of acquiring religious merit.

Q. 91. A, a Muslim, makes a gift of a motor car to his daughter B and gives possession of the car to her. Thereafter A revokes the gift. Is the revocation valid? Would it make any difference :--

(*i*) **if B was A's wife's sister ;**

(*ii*) **if B was the daughter of a person in no way related to A and had before the revocation sold the car to Z ?**

Ans. A gift cannot be revoked after delivery of possession when the donee is related to the donor within prohibited degrees. *B*, the donee, being the daughter of *A* is related to him within prohibited degrees of consanguinity. Hence *A* cannot revoke the gift of the motor car after delivery of possession to *B*. The revocation would be void.

(*i*) If *B* was *A*'s wife's sister, the revocation would be valid.

A wife's sister does not come within prohibited degrees of relationship, for---

(1) There is nothing to prevent a man from marrying the wife's sister after the death or divorce of the wife;

(2) A marriage with the wife's sister during the wife's lifetime is not void but merely irregular.

Hence the gift in favour of the wife's sister can be revoked even after delivery of possession by a decree of the Court under the Sunni Law and by a mere declaration on the part of the donor under the Shia Law.

(*ii*) *M B* was the daughter of a person in no way related to *A* and had sold the car to *Z*, the gift becomes irrevocable.

A gift cannot be revoked when the thing given has passed out of the donee's possession by sale.

Q. 92. State the conditions under which, a valid gift through the medium of a trust may be created in Islamic Law.

Ans. Gift may be made through the medium of a trust: Same conditions are necessary for the validity of such a gift as those for a gift to the donee direct, with this difference that the gifts should be accepted by the trustees, and possession also should be delivered to the trustees.

A Muslim cannot through the medium of a trust settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a trust create an estate not recognized by the law of gifts governing the sect to which he belongs. Thus neither a Sunni nor a Shia can make a gift in favour of an unborn person; so he cannot through the medium of a trust settle property in favour of an unborn person. Sunni Law recognizes the creation of a life-estate, and so presumably a life-estate can be created through the medium of a trust; though not a vested remainder. But the Shia Law recognizes life-estates and vested remainders. A Shia may, therefore, create such estate through the medium of a trust, but not in favour of unborn persons. Successive life-interests, however, may be created both under the Sunni and Shia Law in favour even of unborn persons by means of a Wakf.

Q. 93. What is Revocation of Gift and what is difference between Sunni Law and Shia Law ?

Ans. Revocation of gift : According to Islamic Law, all voluntary transactions are revocable ; hence, gifts may also be revoked. There is, however, a difference in the case of completed and uncompleted gifts; *i.e.*, after or before the delivery of possession.

Before delivery : A gift may be revoked by the donor at any time before delivery of possession. The reason is that the gift is no gift before delivery of possession, and hence, the rules relating to gifts do not apply over it

After delivery : When a gift is made and the subject-matter of the gift is duly transferred to the possession of the donee, its revocation is only possible (*a*) by the intervention of the Court of law, or (*b*) by the consent of the donee; a mere declaration on the part of the donor is not enough.

Illustration

A makes a gift of a house to *B* and *B* accepts it ; but before the delivery of possession *A* changes his mind; this is an incomplete gift; and if no further steps are taken by *A* in pursuance of his original intention, the gift does not take effect. It is best not to call this a revocation at all, because the gift never materialized. The situation would have been entirely different if *A's* change of mind would have come after delivering possession of the house to *B*. In that case, *A* could have never revoked the gift unless *B* himself agreed to it or a Court of law had permitted it.

Following completed gift cannot be revoked even with the consent of the donee, or intervention of the Court :

(*i*) where it is made by the husband to his wife, or *vice versa* ;

(*ii*) where the donor and donee are related to one another within the prohibited degrees by consanguinity;

(*iii*) where the donor or donee dies ;

(*iv*) where the thing given is destroyed or lost;

(*v*) where the thing given has passed out of the donee's possession by sale, gift or otherwise;

(*vi*) where the thing given has been increased in value ;

(*vii*) where the thing given is so changed that it cannot be identified (for example, when wheat is grinded into flour);

(*viii*) where the donor has received a return (*iwaz*) for the gift;

(*ix*) where the motive of the gift is religious or spiritual, for in this case the gift amounts to *sadaqa*.

Difference: Shia Law differs from the Hanafi Law in the following particulars:---

(1) A gift to any blood relation whether within the prohibited degree or not is irrevocable after delivery of possession.

(2) A gift by a husband to his wife or by wife to her husband is according to the latter opinion revocable.

(3) A gift may be revoked by a mere declaration on the part of the donor without any proceedings in Court.

Q. 94. What are the principal points of difference between Sunni Law and Shia Law regarding Gift ?

Ans. Difference between Sunni and Shia Law : Following is the difference between Sunni Law and Shia Law regarding Gift :--

	Sunni Law	*Shia Law*
1.	The gift of a debt is valid not only to the debtor but also to any person.	1. The gift of a debt to the debtor is valid but not to any other person.
2.	Doctrine of Mushaa applies.	2. It does not apply.
3.	The gift of a debt to the debtor is valid without acceptance but becomes inoperative if it is refused.	3. It is valid without acceptance.
4.	The delivery of possession to a *de facto* guardian is sufficient if the child is in the lap.	4. There is a difference of opinion on the question as to whether delivery to a *de facto* guardian would be sufficient.
5.	Successive life-interests for secular purposes are not recognised.	5. Such life-interest are recognized.
6.	Gifts between husband and wife are irrevocable.	6. The better oipinion supports the irrevocability.
7.	Gifts to relations within prohibited degrees by consanguinity are irrevocable.	7. Gifts to all blood relations whether within prohibited degrees or not are irrevocable.
8	A decree for revocation is needed after delivery of possession unless there is consent.	8. No decree for revocation is necessary. Mere declaration is sufficient.

Q. 95. What is difference between Will and Gift according to Islamic Law ?

Ans. Difference between Will and Gift : Following are the main points of difference between the two :--

(1) Gift is an immediate transfer of right or interest, Will is a transfer of right to take effect after the death of the testator.

(2) In a gift transaction, delivery of possession is necessary, in a Will it is not required.

(3) The subject of gift must be in existence at the time of gift; it need not exist at the time of making the Will. It is sufficient if the subject is in existence at the death of testator.

(4) Right of donor to gift is unrestricted. The right of making a bequest is limited in two ways.

(5) After completion, a gift cannot be revoked unless by a formal decree of a Court; a Will may be revoked any time after making it.

(6) Doctrine of *Musha'* has no application in case of disposition made by Will.

CHAPTER 11

Wakfs

Q. 96. Define 'Wakf' and what are the Characteristics of Wakf ?

Ans. Wakf : Word "*Wakf*" literally means 'detention' and connotes tying up of property in perpetuity.

According to Abu Yusuf, *wakf* is the detention of a thing in the implied ownership of Almighty God, in such a way that its profits may be applied for the benefit of human beings, and the detention when once made, is absolute, so that the thing dedicated can neither be sold, nor given, nor inherited.

Imam Muhammad does not subscribe to this view. He thinks that the right of the *wakif* does not cease in the property until he has appointed a *Mutawalli* and delivered its possession into his hands.

Imam Abu Hanifa's view is entirely and basically different from the views of his above two disciples. For him, *wakf* is the tying-up of the substance of property in the ownership of the *wakif* (founder of *wakf*). The ownership of *wakif* is not extinguished unless the *kazi* pronounces an order to this effect. He fortified his view by reference to a Tradition of the Prophet for the validity of sale of *wakf* property, and that no spiritual benefit could be derived unless the *wakif* remained the owner of the *wakf* property. According to him, the *wakf* property reverts back to its owner (*wakif*) or his heirs in case the object fails. Moreover, Abu Hanifa's thesis is that *wakif's* right could not come to an end without the ownership being transferred to some other person, for the law does not admit the idea of a thing during its existence going out of the possession of one owner without falling into the ownership of another person.

The view of Abu Yusuf is accepted. In some of the cases like *Kassimiah Charities* v. *Secretary, Madras State Wakf Board;* **AIR 1964 Mad. 18,** and *Moti Shah* v. *Abdul Ghaffar Khan*, **AIR 1956 Nag. 38.**, it has been held that *wakf* means detention of the corpus in the ownership of God in such a manner that its profits may be applied for the benefit of, His servants. The objects of dedication must be religious or charitable.

Delivering the judgment of the *Privy Council* in the famous case of *Vidya Varuthi* v. *Balusami Ayyar*, **(1921) 48 IA 302,** Mr. Justice Ameer Ali said :

Islamic Law relating to *wakfs* owes its origin to a rule laid down by the Prophet of Islam : and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'. When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf*, or

the tenor of the document shows, as in the case of *Fiwan Doss Sahu* v. *Shah Kubearuddin*, **(1840) 2 MIA 390**, that a dedication to pious or charitable purposes is meant, the right of the *wakif* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit."

"*Wakf* means a permanent dedication by a Muslim (or by a non-Muslim under certain restrictions) of any movable or immovable property for any purpose recognised by the Islamic Law as pious, religious or charitable."

The definition of *wakf* by Shias does not make it clear as to whom the corpus belongs, that is, whether the ownership vests in God or in someone else. Tyabji, however, says that according to Shiite authorities, the corpus belongs to the beneficiaries. (*Fyzee, 269*)

According to the case of *Kaniz Begum* v. *Akbar Jan*, **1984 SCMR 1493**, the term '*wakf*' literally means detention. The legal meaning of *Wakf*, according to Abu Hanifa, is the detention of specific thing in the ownership of the *Wakif* or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects." According to the two disciples, Abu Yousuf and Muhammad *Wakf* signifies the extinction of appropriator's ownership in the thing dedicated and the detention of the thing is the implied ownership of God, in such a manner that its profit may revert or be appllied 'for the benefit of mankind'. One of the recognised objects of a *Wakf* is mosque. A mere declaration is sufficient to complete the *Wakf*. According to Muhammad, the *Wakf* is not complete unless, besides a declaration of *Wakf*, a *Mutawalli* is appointed by the owner and possession of the endowed property is delivered to him.

Its origin according to Sunni Jurists is the direction the Holy Prophet gave to Omar who wanted to give his land in charity. The Prophet said: "Tie up the property (*asl* or corpus) and devote the usufruct to human beings and it is not to be sold or made the subject of gift or inheritance, devote its produce to your children, your kindred and the way of God." The word '*wakf*' according to its universally accepted connotation, is inapplicable to a case where the corpus of the dedicated property is intended to be consumed.

Characteristics of Wakf : Three dominant characteristics of *wakf* are:

(1) Religious or pious motive; a merely secular motive would render the dedication a gift or trust, but not *wakf* which is not permanent may be.

(2) Permanent nature; a pious dedication which is not permanent may be *sadaqa* but cannot in law be termed as *wakf*.

(3) Utilization of usufruct for the good of mankind.

Q. 97. State the General Principles relating to Wakf.

General Principles relating to Wakf: General principles relating to *wakfs* are as under:--

(1) The dedication must be permanent. A *wakf*, therefore for a limited period is not valid. Further, the purpose for which a *wakf* is created must be for a permanent character.

(2) The subject of *wakf* under the Wakf Act may be "any property". A valid *wakf* may, therefore, be made not only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money.

(3) The property dedicated by way of *wakf* must belong to the *wakif* (dedicator) at the time of dedication. A person who is in fact the owner of the property but is under the belief that he is only a *muttawalli* thereof is competent to make a valid *wakf* of the property. What is to be seen in such cases is whether or not that person had a power of disposition over the property.

(4) A mushaa or an undivided share in property may, according to the general view, from the subject of *wakf*, whether the property be capable of division or not. Except that the *wakf* of a mushaa for mosque or burial ground is not valid, whether the property is capable of division or not.

(5) The purpose for which a *wakf* may be created must be one recognized by the Islamic Law as "religious, pious or charitable". A *wakf* may also be created in favour of the settlor's family, children and descendants.

(6) The objects of a *wakf* must be indicated with reasonable certainty; if they are not, the *wakf* will be void for uncertainty. But it is not necessary, that the objects should be named. Nor is it necessary, where the objects are specified to name the sum to be spent on each object.

(7) Where a *wakf* is created for mixed purposes, some of which are lawful purposes, and some of which are unlawful, it is valid in regard to lawful, but invalid as to the rest. Where the property is not specifically dedicated to an object which fails, the whole amount will be devoted to the valid object of charity.

(8) Where a clear charitable intention is expressed in the instrument of *wakf*, it will not be permitted to fall because the objects, if specified, happen to fail, but the income will

be applied for the benefit of the poor or to objects as near as possible to the objects which failed. This is called the doctrine of Cypres.

(9) Every Muslim of sound mind and not a minor may dedicate his property by way of *wakf*.

(10) A *wakf* may be made either verbally or in writing. It is not necessary in order to constitute a *wakf*, that the term "*wakf*" should be used in the grant, if from the general nature of the grant itself such a dedication can be inferred. Where it is not clear whether a grant constitutes a *wakf*, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration.

(11) A *wakf* may be created by act *inter vivos* or by will.

(12) A Muslim may dedicate the whole of his property by way of *wakf*. But a *wakf* made by will or during *marz-ul-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

(13) A *wakf inter vivos* is completed, by a mere declaration of endowment by the owner. According to Prophet Mohammad (peace be upon him) the *wakf* is not complete unless, besides a declaration of *wakf*, a *mutawalli* is appointed by the owner and possession of the endowed property is delivered to him.

(14) The founder of a *wakf* may constitute himself the first *mutawalli*. The founder and the *mutawalli* being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner into his name as *mutawalli*.

(15) A *wakfnama* by which immovable property of the value of Rs. 100 and upwards is dedicated by way of *wakf* requires to be registered under the Registration Act, 1908 though the *wakif* (dedicator) may have constituted himself sole *mutawalli* thereof but a "trusteenama" by which he appoints additional *mutawallis* does not require registration if the document does not purport to transfer any interest in the property to them.

(16) If land has been used from time immemorial for a religious purpose, *e.g.*, for a mosque or a burial ground or for the maintenance of a mosque, then the land is by user *wakf* although there is no evidence of an express dedication.

(17) A testamentary *wakf*, that is, a *wakf* made by will, may be

revoked by the *wakif* (dedicator) at any time before his death.

(18) The *wakif* (dedicator) may, at the time of dedication, reserve to himself the power to alter the beneficiaries either by adding to their number or excluding some, and to increase or reduce their shares.

(19) It is essential to the validity of a *wakf* that the appropriation should not be made to depend on a contingency.

(20) Under the Hanafi Law, the *wakif* (dedicator) may provide for his maintenance out of the income of the *wakf* property. He may, if he wishes, reserve even the whole income for himself for his life.

(21) *Wakf* property is not liable to attachment and sale in execution of a personal decree against the *mutawalli*, nor can the rents and profits thereof be seized in execution.

(22) A suit for a declaration that property belongs to a *wakf* can be brought by a Muslim interested in a *wakf* without the sanction of the Advocate-General. The provisions of Section 92 of the Code of Civil Procedure, 1908, do not apply to such a suit. That sanction applies only to suit claiming any of the reliefs specified in it.

Q. 98. What are Essentials of a valid Wakf ?

Ans. Essentials of valid Wakf : Essentials of valid *wakf* may be briefly summarized as follows:

(*i*) There must be a clear intention on the part of *wakif* to create the *wakf*.

(*ii*) *Wakif* must declare his intention, either orally or in writing.

(*iii*) *Wakif* must be the owner of the property to be dedicated as *wakf*.

(*iv*) The *wakf* must be perpetual; although, no express mention of perpetuity of *wakf* is essential and it is presumed, nevertheless if *wakfnama* says that the *wakf* is for, say, 50 years, it is invalid.

(*v*) The objects of *wakf* should not be in conflict with the Islamic principles.

(*vi*) The *wakif* must be of sound mind and major, and a Muslim. However, *wakfs* by non-Muslims are recognized under certain conditions.

(*vii*) *Wakf* must not be contingent or conditional.

Q. 99. What can be made as Wakf ?

Ans. According to Abu Hanifa and Abu Yusuf, only immovable

property can be made *wakf*. The only exception which Abu Yusuf allows is for the beasts of burden and weapons of war, which according to him can be made *wakf*. Imam Mohammad, however, holds that all articles or movables that can be subjected to the dealings and transactions of men, may lawfully be dedicated as *wakf*. This opinion of Imam Muhammad is followed in country. Thus, *wakfs* of the following movable are valid:

(*i*) Qur'an for reading in mosques, *etc.* ;

(*ii*) Working cattles and instruments of husbandry;

(*iii*) War horses, camels, and other animals;

(*iv*) Swords;

(*v*) Chest of money for loans to the poors;

(*vi*) Shares in companies;

(*vii*) Securities, *etc.*, *etc.*

The Wakf Validating Act, 1913 has permitted a *wakf* of "any property". This broad term naturally includes movable property.

As to the validity of *wakf* of *musha* or undivided shares in a property which is capable of division, Imam Muhammad holds that *wakf* of *Musha* is unlawful, while according to Abu Yusuf, it is valid. In the country, the view of Abu Yusuf is followed.

Q. 100. In whose favour can Wakf be made ?

Ans. Beneficiaries of wakf : Islamic Law does not insist that a man must necessarily be poor to have benefit of a *wakf*. All persons, whether rich or poor, may be beneficiaries. But, when the objects of *wakf* become impossible or extinct, the inherent ultimate purpose of every *wakf* is, no doubt, the relief of the poor and destitute.

Following may be the beneficiaries:

(*i*) The *wakif* himself (only in Hanafi Law);

(*ii*) The family and descendants of *wakif*; and

(*iii*) General public.

(*i*) **'Wakif' himself :** This is recognized in Hanafi Law alone. Shia Law does not approve of it. The Shia authorities and also Imam Muhammad argue that the *wakif*, having once relinquished his proprietary rights in favour of God, cannot take any benefit from such property. While Imam Abu Hanifa argues that the *wakif's* interest in the dedicated properties continues even after the creation of *wakf*; hence, there is no difficulty in allowing him to share with others the usufruct of the *wakf* property. (*Fyzee, 290*).

In the country, it is the opinion of Abu Hanifa that is followed in regard to Hanafis. Thus, a Hanafi Muslim may validly reserve the

whole of the usufruct for his own life or for a lesser period, or pay his debts out of *wakf* income.

(*ii*) **Wakif's family and descendants** : Before 1913, *wakf's* created substantially or exclusively for *wakif's* family and descendants were treated as invalid. But after the passing of the Mussalman Wakf Validating Act, 1913, *wakfs* for the benefit of family are valid.

The term "family" has been liberally interpreted by the Courts, and has never been confined to persons dependent for maintenance on the *wakif*. In a recent case the Allahabad High Court observed:

> "The word 'family' in Section 3 (*a*) (of Wakf Validating Act, 1913) has to be given a wide and not a restricted meaning and a person may belong to a 'family' if either he is from a common progenitor or if he is living under the same roof and is being supported and maintained by the settlor. As long as one of these two conditions are satisfied, the beneficiary would be a member of the family within the meaning of the Act."

(*iii*) **General public** : There is universal recognition of such *wakfs* which are created for the public in general. This is in keeping with the spirit of Islam and the teachings of the Prophet.

Q. 101. Describe Objects of wakfs.

Ans. Objects of Wakf : Objects of Wakf may be for the benefit of persons of for any object of piety and charity. The term "charity" includes every purpose which is recognised as "good" or "pious". Every good purpose which God approves, or by which approach (Kurbat) is attained to him, is a fitting purpose for a valid and lawful *wakf*. Objects of a *wakf* may be religious, charitable or private.

Following are valid objects of a wakf :

(1) Mosques and provisions for Imams to conduct worship therein.

(2) Colleges and provisions for professors to teach in them.

(3) Aqueducts and bridges.

(4) Distribution of alms to poor and assistance to poor to enable them to perform pilgrimage to Mecca.

(5) Celebrating the birth of Ali Murtaza.

(6) Keeping Tazias in the month of Moharram.

(7) Repairs of imambaras.

(8) Maintenance of a Khankah.

(9) Celebrating the death anniversaries of the settlor and his family.

(10) Burning lamps in a mosque.

The following are not valid objects of a *wakf* :

(1) Objects prohibited by Islam.

(2) Payment to lawyers.

(3) Providing for the rich exclusively.

(4) Dedication to objects which are not certain.

(5) A direction to spend a certain sum of money for feasting Cutchi Memos every year on the anniversary of the settlor's death.

But objects prohibited by Islam, *e.g.*, erecting or maintaining a church or temple are invalid.

Conclusion: The objects for which a wakf may be created must be one recognized by the Islamic Law as "religious, pious or charitable. Specification of objects is not necessary. A trust for charity simpliciter, so long as it is confined to charity exclusively, is a perfectly good wakf. A wakf may be created for the settlor's own family and his descendants provided ultimate benefit is reserved for charitable purposes. A Hanafi Muslim can make a provision for his own maintenance or for the payment of his debts out of the rents and profits of the property dedicated but there should be ultimate benefit reserved for the poor or for any other purpose recognized as religious ; pious or charitable.

Objects Partly valid and Partly invalid : Where a wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the dedicator. Where the property is not specifically dedicated to an object which fails, the whole amount will be devoted to the valid objects of charity.

Where some objects fail : Where some objects of the wakf fail and some do not fail, the income will be applied to objects which have not failed. This upon the basis of the doctrine of cypres which is as under : where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed.

Q. 102. How is Wakf completed according to:

(*i*) Hanafi Law, and (*ii*) Shia Law ?

Ans. Completion of wakf--(1) Hanafi Law : A *wakf, inter vivos* according to Hanafi Law, is completed by a mere declaration of endowment by the owner, according to the view of Imam Abu Yusuf.

But Imam Muhammad does not deem the *wakf* completed unless, besides a declaration of *wakf*, a *mutawalli* is appointed by the owner and possession of the endowed property is delivered to him.

The founder of a *Wakf* may constitute himself the first *mutawalli*, the founder and the *mutawalli* being the same person, no transfer of physical possession is necessary, whichever of the above views is upheld. Nor is it necessary that the property should be transferred from his name as owner into his name as *mutawalli*.

But the *wakf* should be made in good faith and with a real intention on the part of the dedicator of divesting himself of the ownership of the *wakf* properties. Subject misfeasance or malfeasance on the part of a *mutawalli* cannot invalidate a valid *wakf*.

If a *wakf* created by a document which establishes by its terms a religious or charitable trust, and it is completed by delivery of possession it is not open to the settlor or those claiming under him to say that it was not intended to be acted upon. For if a *wakf* has been created it is immaterial that it has not been acted upon as that is only a matter of breach of trust. But the settlor and those claiming under him are not precluded from showing that no *wakf* has been created at all and that the deed was not intended to operate as a *wakf*, but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon.

Shia Law : Under the Shia Law, a *wakf inter vivos* cannot be created by a mere declaration, there must also be delivery of possession. Under the Shia Law the *wakif* is entitled to constitute himself the first *mutawalli* and he is entitled to reasonable remuneration as a *mutawalli* the ordinary rule being that he should not take more by way of salary than that which is fixed for other *mutawallis*. No delivery of possession is necessary when the *wakif* constitutes himself the first *mutawalli*, but it is necessary in that case that the character of his possessions should be changed from that of owner to that of *mutawalli* or custodian of the *wakf*. Where the ordinary means of showing change is mutation of names in a public register the absence of change of names is significant and important, but mutation is not for this purpose the only method nor is it necessary as to every item of the property dedicated. In any case of doubt the settlor's conduct must be regarded broadly and as a whole. But where change of possession has been effected, the settlor's actions in dealing with the property as his own will not invalidate the *wakf*, but amount to breaches of trust. If the *wakf* is testamentary a clear and unequivocal direction in the will dedicating specified property to do and "vesting" it in a *mutawalli* is sufficient.

Q. 103. What kinds of properties can be made subject of a Wakf ?

Ans. Sunni Law : There is a conflict of opinion among Abu

Hanifa and his two disciples as regards property which can become the subject of *wakf*. Abu Hanifa is of the view that land alone can be the subject of *wakf*, but not movable property, even if accessory to land. Abu Yusuf and Imam Muhammad hold that immovable as well as movable properties can be the subject of *wakf*, but they differ as to what properties should be covered among movables for the purposes of *wakf*. According to Imam Muhammed, all articles or movables that can be subjected to the dealings and transaction of men may be dedicated lawfully, but Abu Yusuf does not put such a liberal construction.

According to the *Fatwa-i-Alamgiri*, the Hanafi Law includes the following as subjects of a valid *wakf* :--

Immovable property, accessories to it, beasts of burden, arms, Qur'an, other books, and other articles as are customarily made the subject of the *wakf*, but not things that admit use without destruction of the subject. In this connection Syed Ameer Ali beautifully observes:

"The doubt, which one or two of the ancient Hanafi doctors had expressed as to the validity of the *wakf* of certain kinds of movable property in contradistinction to certain other things, was the outcome of primitive and archaic conditions of society, and was founded on the notion that as perpetuity was essential to the validity of *wakf*, it could hardly be secured by the dedication of movable things generally. But as the Muslim communities progressed in material civilisation and commerce developed, it came to unversally recognised that the wakf of everything, to which practice appertains, which forms the subject among mankind or which it is customary in any particular locality to do so, it is valid. The observant reader will not fail to see that 'custom' or 'usage' (*urf*) is an important factor in Islamic Law. Like *Istehsan* (liberal interpretation) it expresses the spirit of development. It enables communities to progress and develop in spirit of the strict letter of the law."

Shia and Shafei Laws : Under the Shia and the Shafei Laws, land and everything that cannot be consumed by use, and everything lawfully saleable, may form a valid subject of *wakf*.

Q. 104. How far the doctrine of 'Cypres' applies to Wakfs ?

Ans. Doctrine of Cypres : If from change of circumstances and lapse of time or for some other proper reason, it has become impossible to apply the property of the *wakf* in the manner directed by the *wakif*, the Court may apply it for similar purposes by different means, as near as possible to the original intentions of the grantor. This is called the *Cypres doctrine*. It received judicial recognition in, **36 Bomb. 111**, where it was laid down that "Where the testator has indicated a general charitable intention in the bequest made by him and if these bequests fail, the Court can devote the property to religious and charitable purposes according to the *Cypres doctrine*".

Therefore, when a clear charitable intention is expressed in the instruments of the *wakf* if will not be permitted to fail because the objects, if specific happen to fail, but the income will be appied for the benefit of the poor or to object as near as possible to the objects which failed. Mere vagueness or uncertainty will not lead to the failure of a *wakf*, the Courts will supply the defect by declaring the object of the dedication. It should be further noted that the doctrine of *Cypres* is applied when the original *wakf* is valid.

Q. 105. Is wakf of Mushaa valid ?

Ans. Wakf of Mushaa : There is a difference of opinion between Imam Muhammad and Abu Yusuf as regards the *wakf* of a Mushaa. According to Imam Muhammad, the *wakf* of Mushaa in property capable of partition is not valid, since the delivery of possession by the *wakf* to the *mutawalli* is an essential condition for validity of a *wakif*. Abu Yusuf, on the other hand, holds that a *wakf* of a Mushaa in property capable of partition is valid. He further observes that the *wakf* of a Mushaa of a mosque or burial ground is not valid whether or not property is liable to division. He supports his contention on two grounds one of which is that the "continuance of a participation in anything is repugnant to its becoming the exclusive right of God."

The view of Abu Yusuf prevails in Pakistan.

Q. 106. Is a contingent wakf valid ?

Ans. Contingent Wakf : *Wakf* must not be made to depend on the happening of a contingency.

Illustrations

A Muslim wife conveys her property to her husband upon trust to maintain herself and her children out of the income and to hand over the property to the children on their attaining majority and in the event of her death without leaving children to devote the income to certain religious uses. It was held that this was not a valid *wakf* as it was contingent on the death of the settlor without leaving an issue. **13 Mag. 66.**

Q. 107. How is wakf constituted ?

Ans. Constitution of wakf : A *wakf* may be created by an act *inter vivos* or by *will*. A *wakf* may be made either verbally or in writing. Testamentary *wakf* comes into effect after the death of the *wakif* and is subject to the same restrictions as a bequest to an individual, that is, a *Wâkf* by a *Will* or during *marz-ul-maut* cannot operate upon more than the one-third of the net assets without the consent of the heirs.

Q. 108. How can a wakf be revoked ?

Ans. Revocation of a wakf : A testamentary *wakf*, that is, a *wakf* made by a will may be revoked by the *wakif* at any time before

his death. Where at the time of creating a non-testamentary *wakf* the *wakif* reserves to himself the power of revoking the *wakf*, the *wakf* is invalid.

Q. 109. Can a wakif reserve a life-interest for his benefit ?

Ans. Reservation of life-interest : Under the Hanafi Law the *wakif* may provide for his maintenance out of the income of the wakf property. He may, if he wishes, reserve the whole income for himself for his life. The wakif may also provide for the payment of the debt out of income of the property.

Illustrations

(*a*) A Hanafi Muslim executes a deed of *wakf* by which he directs his debts to be paid out of the rents and profits of the *wakf* property. This is a valid *wakf*.

(*b*) A Hanafi Muslim executes a deed of *wakf* by which he reserves the whole legal and beneficial interest to himself during his life time. The *wakf* is invalid.

Shia Law : According to this law, as a settlor cannot reserve for himself a life-interest in the income or any portion thereof, though he may provide for the maintenance of his family, children and dependants.

Q. 110. Explain what is meant by wakf-bil-wasiyat ? Is such a wakf permitted by Shia Law ?

Ans. Wakf-bil wasiyat : A *wakf* may be created by an act *inter vivos* or by will. *Wakf-bil-wasiyat* means a *wakf* by way of a will. Its effect is that the *wakf*, instead of coming into operation at once remains suspended till the death of the testator. A *wakf-bil-wasiyat* is subject to all the previous conditions pertaining to the testamentary capacity of the property of the waqif. A *wakf-bil-wasiyat* of more than one-third of property is invalid unless the heirs of the settlor assent.

Shia Law : It was held at one time that a Shia cannot create a *wakf* by will. But the view was erroneous and it has been held by the Privy Council that a Shia may also create a *wakf* by will.

Q. 111 State the law relating to Private and Public Wakfs both before and after the passing of Mussalman Wakf Validating Act, 1913.

Ans. Private and public wakfs : *Wakf* may be divided into two classes, *viz.*, (1) public and (2) private. A public *wakf* is one for a public, religious or charitable object. A private *wakf* is one for the benefit of the settlor's family and his descendants, and is called *wakf-alal-aulad*. It was considered at one time "to constitute a valid *wakf* there must be a dedication of property solely to the worship of God or to religious or to charitable purposes" in other words, that a private *wakf* was in no case valid. But this extreme view is no longer tenable

and a private *wakf* may now be made subject to certain limitations. These limitations are very strict under the law as it stood before the Wakf Act of 1913. They have been considerably relaxed by the Wakf Act.

A *wakf* exclusively for the benefit of the settlor's children and descendants in perpetuity was invalid before the Wakf Act. It is also invalid under that Act.

A *wakf* both for the benefit of the settlor's family, children, and descendants, and for charity was valid if there was a substantial dedication of the property to charitable uses at some period of time or other. But if the primary object of the *wakf* was the aggrandizement of the family, the gift to charity was illusory whether from its small amount or from its uncertainty and remoteness, the *wakf* for the benefit of the family was invalid and effect could be given to it. Under the Wakf Act, a *wakf* for the benefit of the family is valid, that if the gift to charity is illusory. All that is necessary under the Act is that there should be an ultimate gift to charity.

Under the law before the Wakf Act of 1913, a *wakf* was valid if the effect of the deed of *wakf* was to give the property in substance to charitable uses. It was not valid if the effect was to give the property in substance to the testator's family.

A Muslim conveys property to a *mutawalli*, *A. B.* with a direction to defray out of the profits of the endowed land the expenses of a mosque, to give aims to mendicants, to educate poor students, and to utilize the surplus for the marriages, burials and circumcision of the members of *A. B's* family. Here there is a substantial dedication to charity ; the *wakf* therefore, is valid.

Two Muslim brothers executed a deed purporting to make a *wakf* of all their immovable property for the benefit of their children and their descendants from generation to generation, and, on total failure of all their descendants, for the benefit of widows, orphans, beggars and the poor. The provision for the settlor's children and their descendants is void according to the Law before the Wakf Act, for the gift to the poor is too remote, and it is not to take effect until the total extinction of all the descendants of the settlor.

It is now declared by the Mussalman Wakf Validating Act that it is lawful for a person professing the Muslim faith to create a *wakf* which in all other respects is in accordance with the provisions of the Islamic Law, for following among other purposes:--

(*i*) for the maintenance and support wholly or partially of his family, children or descendants, and

(*ii*) where the person creating a *wakf* is a Hanafi Muslim also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Islamic Law as a religious, pious or charitable purpose of a permanent character.

No such *wakf* is to be deemed to be invalid merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants, of the person creating the *wakf*.

Q. 112. Distinguish between a Wakf and a Trust and also between the powers of a Mutawalli and of a trustee.

Ans. Wakf and Trust : The Trusts Act applies to the Muslims in Country but it does not affect a trust for a charitable purpose, whether it be the form of a a *wakf* or any other form. The chief points of distinction between a trust and a *wakf* are :

(1) A religious motive is required in *wakf*, but no such motive in necessary in a trust.

(2) A settlor cannot reserve any benefit for himself except under the Hanafi Law (*See* Sec. 3 (*b*) of the Mussalman Wakf Validating Act, 1913) but the author of a trust can be a beneficiary.

(3) A *wakf* can be made for any religious, pious or charitable purposes, whereas a trust may be made for any lawful object.

(4) A Mutawalli is merely a manager or superintendent of the property of the *wakf* ; the property does not vest in him, but the effect of appointing a trustee is to vest the property in him.

(5) A Mutawalli may ask for some remuneration but a trustee cannot.

(6) A *wakf* being a permanent dedication cannot be revoked in any circumstances except where it is made by will and the testator is not dead, for in that case, the will has not come into effect at all. A trust may, however, be revoked in certain circumstances.

(7) The property of a *wakf* cannot be alienated whereas the trust property may be alienated.

Q. 113. Distinguish between a Wakf and Sadaqa.

Ans. Wakf and Sadaqa : *Wakf* and Sadaqa are distinguished as under :

By Sadaqa, the legal estate and not merely the beneficial

interest passes to the charity to be held by the trustees appointed by the donor. In a *wakf* the legal estate ownership is not vested in the trustee or mutawalli but it is transferred to God. The trustee of a *wakf* cannot alienate the *corpus* of the property, except in case of necessity with the Court's permission or when authorised by the settlor to do so. In Sadaqa both the *corpus* and the usufruct are given away and the trustees can sell the property itself.

Q. 114. Write a detail note on Mutawalli.

Ans. Mutawalli : *Wakf* property does not vest in the *mutawalli* but in God. He is only a Manager or Superintendent of the property.

(*i*) **Competence :** Anyone, of any faith, female or male, who is competent to administer property may become *mutawalli*. But where religious duties are involved, a person of another religion or a woman may be disqualified. Nevertheless, a woman may be allowed to hold this office provided her duties could be separated from the religious duties and the latter could be performed by a substitute. But, for example, where the duties of *mutawalli* include *imamat* (leading the prayers), a woman is wholly disqualified from this office.

It is well settled that the following may act as *mutawalli* :--

(*i*) *Wakif* himself and his descendants.

(*ii*) Females.

(*iii*) Non-Muslims.

(*iv*) Sunni in a Shia *wakf* and *vice versa*.

(*ii*) **Appointment of mutawalli :** A *mutawalli* may be appointed by:---

(*i*) the *wakif* himself ;

(*ii*) his executor;

(*iii*) the *mutawalli*; and

(*iv*) the Court.

(*i*) **By the 'wakif' himself :** It was held in *Advocate-General* v. *Fatima Begam*, **9 Bim HCR 19,** that the *wakif* has a right to reserve superintendence of *wakf* to himself, and to appoint a *mutawalli* during his lifetime whenever he likes.

Generally, in cases of private *wakfs*, the *wakif* has absolute rights to appoint a *mutawalli*, but in case of public charitable or religious *wakfs*, this power may be subject to the approval of Court. That is, in some cases, the Court may appoint a *mutawalli* over and above the *wakif*, provided it is in the interest of *wakf*

(*ii*) **By his executor :** The power of appointing the *mutawalli* primarily rests with the *wakif*, and in his absence, it rests with his executor.

(*iii*) **By mutawalli :** A *mutawalli* can appoint his successor under very restricted conditions, which are as follows:

Wakif and his executor are both dead;

Wakf deed is silent on the point of succession of *mutawallishiip*.

There is no positive custom regarding such devolution;

The *mutawalli* is on the death-bed, or incapacitated from discharging his duties; or

The *wakf-deed* authorizes him to this effect.

(*iv*) **By the Court :** It was held by the various High Courts that when a vacancy occurs and there is none to take the office, or when the *mutawallishiip* devolves upon a minor, the Court has the power to appoint a *mutawalli*.

(*iii*) **Mutawallishiip whether hereditary :** The office of *Mutawalli* is not hereditary. If, however, there is a custom to the contrary, hereditary succession would be allowed, but the customs has to be proved strictly. Moreover, a *mutawalli* could neither sell nor transfer his office.

Removal of Mutawalli : The Court will remove a Mutawalli who :--

(*a*) denies the Waqf character of the property and sets up an adverse title to it in himself ;

(*b*) with sufficient funds in his hands neglects to repair the Waqf premises and allows them to fall into disrepair ;

(*c*) knowingly and intentionally causes damage or loss to the Waqf property or misdeals with it ;

(*d*) is insolvent.

By the 'Wakif' : Abu Yusuf says that even if the *wakif* has not reserved a right to remove the *mutawalli* in the *wakf* deed he can, nevertheless, remove him. Imam Muhammad, however, says that unless there is such a reservation, the *wakif* cannot do so. This latter view has been adopted in the *Fatwa-i-Alamgiri* and is approved generally in Pakistan.

Limitations of power of Mutawalli : A *mutawalli* can do everything that is *reasonable* and *necessary* for the protection and administration of the *wakf*. But his powers are subject to certain important limitations, which are as follows :--

(*a*) he cannot sell, mortgage or alienate *wakf* property, without the permission of the Court or the *Wakf* Board,

(*b*) he cannot transfer his duties, functions and powers to anybody else and make him the trustee, unless authorized by the *wakf*-deed, or any positive custom,

(*c*) he cannot borrow money for spending it on beneficiaries, but can do so only for necessities, such as repairs, *etc.*,

(*d*) he cannot grant a lease of *wakf* property for more than a year, in case of non-agricultural land, and for more than three years, in case of agricultural lands unless the Court gives sanction,

(*e*) he cannot spend on mere improvements of *wakf* properties.

Q. 115. Enumerate Rules relating to Succession to office of a Mutawalli.

Ans. Rules relating to Succession of Mutawalli : Generally the founder of a *wakf* has power to lay down the rules for the succession to the office of *mutawalli*. A *mutawalli* is only a Manager or Superintendent of the *wakf* property. The *wakf* property does not vest in him; it belongs to the Almighty.

Although the *wakf* property is not vested in *mutawalli* he has the same rights of management as an individual owner. His rights and powers are, therefore, very large. The founder of the *wakf* has the power to appoint the first *mutawalli* and to lay down rules for succession to the office of the *mutawalli*. The founder may even nominate the successors by name, or indicate the class together with their qualifications from whom the *mutawalli* may be appointed. The founder may even invest the *mutawalli* with power to nominate a successor after his death or after relinquishment of office. There may, however, be the case where the appointed *mutawalli* dies or refuses to act or is removed by the Court, or the office becomes vacant otherwise and there is no provision in the deed of *wakf* regarding successions. In such cases the following rules regarding successions are observed:--

A new *mutawalli* may be appointed--

(*i*) By the founder of the *wakf*;

(*ii*) By his executor, if any;

(*iii*) If there be no executor, the *mutawalli* for the time being when he is on death-bed, may appoint a successor;

(*iv*) By the Court if no such appointment is made.

Following rules are laid down for the guidance of the Court while making an appointment of a *mutawalli* :

(1) The Court should not disregard the directions of the founder except for the manifest advantage of the *wakf*.

(2) So long as there is any member of the founder's family in existence, and qualified to hold that office, the Court should not appoint a stranger.

(3) The Court is not bound to appoint the lineal descendant in case of a contest with a non-lineal descendant of the founder; but has a discretion in the matter and may even appoint a non-lineal descendant as *mutawalli*.

Office of *mutawalli* is not hereditary but by custom, which has to be strictly proved, the office may become hereditary.

Q. 116. Can a Mutawalli alienate Wakf property ? If so, under what circumstances ?

Ans. Alienation of wakf property by mutawalli : A *Mutawalli* has no power, without the permission of the Court, mortgage, sell or exchange *wakf* property or any part thereof, unless he is expressly empowered by the deed of *wakf* to do so. So a *Mutawalli* has power of alienation only when authorized by the deed of *wakf*. If not so, he should obtain the permission of the Court for this purpose. Alienation in all other cases is void. This restriction upon alienation applies to private as well as public *wakf*.

An instance of such power is a deed of *wakf* which authorized the *mutawalli* to sell the property and utilise the proceeds for the construction and maintenance of a rest house at Mecca. An unauthorized mortgage cannot be partly void. It is void *in toto*.

A mortgage of *wakf* property, though made without the previous sanction of the Court, may be retrospectively confirmed by the Court. A mortgage without the previous leave of the Court is not void *ab initio*. But in all such cases the *wakf* ---

(1) was necessary for the purposes of the *wakf*; and

(2) the pledge was not of the corpus but of the income.

The sanction to obtain the permission of the Court to alienate *wakf* property can be obtained by making an application to the Court and it is not necessary to bring a suit.

Where a *mutawalli* makes an unauthorized alienation of *wakf* property, any beneficiary has the right to bring a suit for possession. It is not necessary to file a representative suit.

Q. 117. Write a note on Wakf-alal-awlad.

Ans. Wakf-alal-awlad : A *wakf-alal-awlad* is a *wakf* created for settlor's own family and his descendants. It is really a *wakf* in favour of unborn descendants.

Before the passing of the Mussalman Wakf Validating Act, 1913, a valid *wakf* could be created for the benefit of the settlor's descendants, including unborn persons, provided real and substantial provisions be made for charitable objects. If the effect of the deed was to give the property substantially to charitable uses it would be valid, but if its effect was to give the property in substance to the settlor's family it would be invalid. The real object should not have been the aggrandizement of the family. The dedication to charitable purposes should not have been removed and illusory or made to take effect in a very remote contingency.

But after the passing of the Mussalman Wakf Validating Act, 1913, a Muslim can create a *wakf* for ---

(*i*) the maintenance and support of his family; and

(*ii*) his own maintenance and support and for the payment of his debts out of rents and profits if the settlor is a Hanafi Muslim.

The ultimate benefit in all such *wakfs* should be reserved religious, pious or charitable purposes of a permanent character according to Islamic Law. But such purposes may be postponed until after the extinction of the family, children or descendants of the *wakif*. So now substantial dedication to charity is not necessary. It may seem to be remote and illusory but the *wakf* will be valid if ultimate benefit is reserved for charitable purposes.

Q. 118. Explain legal incidents of a Valid Wakf. Can a wakif reserve to himself an interest in the wakf property under the Hanafi and the Shia Law ?

Ans. Legal incidents of valid wakf : Following are the legal incidents of a valid *wakf* :

(1) The *wakif* must be a person of sound mind and not minor and he must be a Muslim.

(2) The subject-matter of *wakf* must belong to the *wakif* at the time of dedication, and the same must not be dedicated with a view to defraud the creditors.

(3) The object of *wakf* must be one which is recognized by the Islamic Law as "religious, pious, or charitable". A *wakf* for family purpose however is valid under the Wakf Act, 1913.

(4) The object of *wakf* must not be uncertain. It is not necessary that they should be named, or if named, it is not

necessary to name the sum to be spent on each object. What is necessary is that the *wakif* should indicate the object with reasonable certainty.

(5) If from a change of circumstances or lapse of times or for some other reasons it has become impossible to apply the *wakf* property for the purposes indicated by the *wakif* the Court may apply it, as nearly as possible for similar object or after the benefit of the poor by the application of the doctrine of *cypres*.....

(6) The *wakf* should not be made to depend on a happening of a contingency nor should its creation be postponed in any other manner to a future date.

(7) The dedication of the *wakf* property must be final and should not be revocable at the will of the *wakif*.

(8) The *wakf* must not be for a limited period and its object also should be of permanent character.

(9) The *wakif* should provide for the appointment of *mutawalli* and his successors. He may constitute himself the first *mutawalli*.

(10) A *wakf* may be made either orally or in writing. It is also not necessary that the term "*wakf*" should be used if such a dedication can be inferred from the grant.

(11) A *wakf* may be created by act *inter vivos* or by will. The whole of property of a Muslim may be dedicated by him by way of *wakf*. But a *wakf* made by will or during *marz-ul-maut* cannot operate upon more than the legal third without the consent of the legal heirs.

(12) *Wakf* may be created by immortal user, such as a burial ground or for a mosque.

Under the Hanafi Law a *wakif* may reserve to himself an interest in the property and the *wakf* will not be bad simply because of this, because the Hanafi Law allows a *wakif* to provide for his maintenance out of the income of the *wakf* property. Section 3 (*b*) of the Wakf Act, 1913 provides that a *wakf* for the *wakif's* own maintenance and support during his life-time and for the payment of his debts out of the usufruct of the dedicated property is valid under the Hanafi Law. Thus if a *wakif* wishes he may even reserve the whole income for his life-time. This is, however, subject to conditions that a *wakf* may not reserve any interest with intent to defeat or defraud the creditors and if he does so, the *wakif* is voidable at the option of creditors.

According to Shia Law, the *wakif* should completely divest himself of the control over the *wakf* property. Any reservation by him of any interest for his own benefit renders the *wakf* void. The Shia Law

does not object to the *wakif* constituting himself the first *mutawalli* and reserving a salary for himself, not as *wakif* but as *mutawalli* but such salary must be reasonable.

Q. 119. What is the difference between the Trust & Wakf ?

Ans. Diffeerence betweeen Wakf and Trust : These differences may be formulated in a tabular form as follows:

Trust	Wakf
1. No particular motive is necessary.	1. It is generally made with a pious, religious or charitable motive.
2. The founder may himself be a beneficiary.	2. The *wakif* cannot reserve any right to benefit for himself, except to some extent under Hanafi Law.
3. It may be for any lawful object.	3. The objects must be recognised by Muslim Law as pious, religious and charitable and in case of family settlement, the ultimate object must be some benefit to mankind.
4. The property vests in the trustee	4. The property vests in God.
5. A trustee has got a larger power than a *mutawalli*.	5. A *mutawalli* is only a Manager or Superintendent.
6. It is not necessary that a trust may be perpetual, irrevocable or inalienable.	6. A *wakf* is perpetual, irrevocable and inalienable.
7. It is valid for any object which is not in contravention to law or morality.	7. Apart from these requisites, it must be for object recognised as valid by Islamic Law.
8. It results for the benefit of the founder when it is incapable of execution and the property has not been exhausted.	8. The '*Cypres*' doctrine is applied and the property may be applied to some other objects.

CHAPTER 12

Maintenance

Q. 120. Who are bound to maintain-(1) wife, (2) descendants, *i.e.*, children and grand-children, (3) ascendants, *i.e.*, parents and grand-parents ; and (4) collaterals within prohibited degrees.

Ans. Maintenance of wife : The wife has an absolute right of maintenance from the husband, he being bound to maintain her unless she is too young for sexual intercourse, *i.e.*, has not attained an age at which she can render to the husband his conjugal rights, or refuses herself to him without just cause. The case of wife furnishes an exception to the general rule of Islamic Law that ordinarily the right to maintenance is available only to necessitous and indigent persons, who are poor and are unable to take out their existence. Even after divorce the wife is entitled to maintain during *iddat*. But the wife is not entitled to maintenance even during *iddat* when the marriage is dissolved by the death of the husband because in that case she is entitled to inheritance. The right of the wife to maintenance exist in spite of the fact that she can maintain herself out of her own property.

An obedient invalid wife, incapable of matrimonial intercourse is entitled to maintenance.

The husband is bound to maintain his wife even if she is residing in his father's house and her husband does not require her to his own house and can cohabit with her there.

When the husband is incapable of consummating the marriage on account of his minority or capacity, the wife is entitled to maintenance.

Maintenance under Criminal Procedure Code : If a husband neglects or refuses to maintain his wife without lawful excuses, the wife may sue him under S. 488 of the Code of Criminal Procedure, 1898.

Now Sections 488 to 490 are [*omitted by the Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981.*]

The *sine qua non* of jurisdiction of a Magistrate under S. 125 and 126 is the proof and admission of marriage. But the factum of marriage is to be determined according to the personal law. Where the parties are Muslims, Islamic Law will apply. In Islamic Law, a divorced wife does not become a free agent and is not competent to contract a second marriage till full months if the marriage is dissolved by divorce *inter vivos*, 4 months 10 days if the marriage is dissolved by death of the husband. This is called the period of *iddat*. Because of this incapacity for a second marriage the wife is given a right to maintenance for the period. Hence, on principle, when the factum of

Arrears: overdue debt.

marriage is left for determination in accordance with the personal law, this incidence of that law should be taken into account. Thus, owing to these incidences, the marriage tie itself should be deemed to have been extended for the period of *iddat* and the *divorced* wife is entitled to maintenance during the period of *iddat i.e.,* for a period of three months from the date of divorce.

The wife's right to maintenance, however, ceases on the death of her husband, for her right of inheritance supervenes.

The widow is, therefore, not entitled to maintenance during the period of *iddat* consequent upon the death of the husband.

A girl on marriage passes over to her husband's family and there is no obligation on the members of her natural family to maintain her even if she is divorced.

When wife not entitled to maintenance : In the following circumstances a wife is not entitled to maintenance :

(1) When she is so young as to incapable of matrimonial intercourse:

(2) When she refuses to come and live with her husband without any valid or justifiable reason, such as the non-payment of prompt dower or illness ;

(3) When she is disobedient or unjustifiably refractory ;

(4) When she has been imprisoned for any offence or has eloped with somebody, has become unchaste, or has been taken away forcibly by another person ;

(5) When she becomes a widow ;

(6) When she has been separated for her own fault ;

(7) When she has been married by an illegal contract or by an irregular marriage;

(8) When she is able to maintain herself.

Scale of maintenance : In fixing the amount of maintenance payable by the husband to the wife, the Hanafi Law pays regard to the position of both the husband and the wife. The Shafei Law considers the position of the husband alone. The Shia Law determines the amount of maintenance according to wife's requirements in respect of condiments, clothes, food, residence, and as also the custom of her equals among her own people in the same city.

Arrears of maintenance : "Arrears of maintenance are not recoverable except when it was determined and decreed by the *Kazi* before the arrears were due, or when the wife had entered into a composition with the husband responding it, in either of which cases she is to be decreed her maintenance for the past time." *Hedaya.*

Under the Hanafi Law the wife is not entitled to arrears of maintenance against the husband in the absence of a specific agreement of decree. **(1881) 6 Cal. 631.** She may as well as apply for an order of maintenance under S. 125, Code of Criminal Procedure, 1898, in which case the Court may order the husband to make a monthly allowance not exceeding rupees five hundred in the whole. Past maintenance may be claimed without any distinct agreement under Shiite and Shafeis Law.

(2) Maintenance of Children

(*a*) **Maintenance of sons :** A father is bound to maintain his minor sons if they have no sufficient property of their own and are unable to maintain themselves by their own labour. As regards the age of minority for the purpose of maintenance, Sir Ronald Wilson regards it to have been extended until the age of 18 years in view of the Majority Act, 1875. Sir Dinshah Mulla, however, takes a contrary view for, according to him, although the Majority Act extends the period of incapacity in matters other than contracts, wills, gifts, etc. it does not enlarge the duration of a right or of the corresponding duty.

A man is not obliged to maintain his adult sons unless disabled by infirmity or diseases.

While the father is bound to maintain his sons, he can also get work out of them and appropriate their earnings. But it is his duty to make over any surplus to them on their attaining majority.

(*b*) **Maintenance of daughters :** A father is also bound to maintain his female children until they are married, if they have no independence means of their own. He cannot hire them out for work or send them into service under any circumstances.

The expression "absolute right" found in the text-books in connection with the daughter's right to maintenance cannot be interpreted as giving to the daughter an unrestricted right to live as and where she liked and imposing an obligation on the father to provide separate maintenance for her even though he may be willing to keep her in his house and maintain her.

While a Muslim father is under an obligation in law to maintain his daughter till her marriage, if the daughter desires to claim separate maintenance, *i.e.*, maintenance allowance, while she insists on living away from her father, she has to make out the necessary ground for that. **(I.L.R. 1941 Bom. 643).**

Duties of Stepfather : Under the Islamic Law if a man marries a widow with encumbrances, he is usually expected to take over the encumbrances with the widow and feed them ; that is one of the results of marrying a widow. A stepfather does not charge his step-children for their board and lodging.

Maintenance by Mother : "Among the Hanafis, when the

father is poor and the mother rich, the liability to maintain the infant children falls on her, with an eventual right of recovery against her husband, even though the children may have a rich potential grandfather.

"Among the Shias, if the father be poor, the liability rests primarily on the grandfather, if he has means, and not on the mother even though she be rich.

"When the father and mother are both poor, the grand-father, possessed of means, is liable to maintain his infant grandchildren, with a right to recover all money spent on them from the father. But if the latter be infirm, the grandfather would have no right to recovery against him for any debt incurred for the maintenance of the grandchildren. (*Syed Ameer Ali : Mohammedan Law, Vol. II, Pp. 373-374*).

Maintenance of daughter-in-law : There is no obligation upon a father-in-law to maintain the widow of his son under the Islamic Law. **(1948) 52 Bom. L.R. 133.** But according to *Fatwa-i-Alamgiri (Vol. I, p. 753)* a father is bound to maintain his son's wife when such son is young, or poor, or infirm, or engaged in study.

Maintenance under Criminal Procedure Code : There is statutory obligation on the father under Ss. 125 and 126 Criminal Procedure Code, 1898, to maintain his legitimate or illegitimate children who are unable to maintain themselves, by providing a monthly allowance not exceeding five hundred rupees in the whole for their maintenance.

(3) Maintenance of Ascendants : Sons as well as daughters are bound to maintain their indigent or poverty-striken parents even though they be not incapable for earning something by their own labour. All children, irrespective of their sex or relative wealth are to contribute equally. Any child in easy circumstances may be compelled to pay the whole amount required, and having done so may ask the others to contribute equally.

Q. 121. State clearly the difference between Shia and Sunni Law.

Ans. Difference between Shia and Sunni Law.

1. Marriage : (*a*) The Sunni Law does not recognise temporary marriages, *i e , Muta*, but the Shia Law does.

(*b*) The Sunni Law recognises brother and other male relations on the father's side, in the order of inheritance among *residuaries* besides father and paternal grandfather, as legal guardians, for contracting a minor in marriage, but the Shia Law recognises only father and paternal grandfather howhighsoever as legal guardians for marriage of a minor and no other.

(*c*) The Shias require the presence of two witnesses at the dissolution of a marriage, but not at the time it is contracted, while the law is quite contrary amongst the Sunnis.

(*d*) Under the Shia Law, a man may marry his wife's aunt, but he cannot marry his wife's niece without the permission of the wife.

(*e*) The Shias hold ten months to be the longest period of gestation not two years like that of Sunnis.

2. Dower : (*a*) Under the Sunni Law ; the minimum amount which can be settled by a husband upon his wife by way of dower is 10 *dirhams*, but the Shia Law does not fix legal minimum for dower. But the maximum dower according to Shias is 500 *dirhams*.

(*b*) When it is not settled at the time of marriage, whether the dower is to be prompt or deferred, then according to the Shia Law, the rule is to regard the whole as prompt, but according to the Sunni Law, the rule is to regard part as prompt and part as deferred, the proportion referable to each being regulated by custom, and in the absence of custom, the status of the parties and the amount of the dower settled.

3. Divorce : The Shias do not recognise the validity of *talaq-ul-biddat* and a divorce pronounced in a state of intoxication or under compulsion of threats of a serious nature is void.

4. Maternity : Under the Sunni Law, the maternity of a child is established in the woman, who gives birth to the child, irrespective of the lawfulness of her connection with the begetter while under the Shia Law, the maternity will not be established by simple birth but should take place under lawful wedlock.

5. Guardianship : Under the Sunni Law the mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty, while under the Shia Law the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years.

6. Maintenance : According to Shia Law, when more than one relative is liable for the maintenance of a relation, the liability is to be shared according to the means and ability to pay, and not in proportion in which they are entitled to inherit. The collateral's claim for maintenance is not recognised by the Shias.

7. Gift : Under the Shia Law, a gift of an undivided share in property whether capable of division or not, is valid, while under the Sunni Law, gift of an undivided share in property capable of division is irregular.

8. Wakf : (*a*) Under the Sunni Law in case a *Wakf inter vivos*, mere declaration of wakf is sufficient but under the Shia Law, a wakf *inter vivos* cannot be created by a mere declaration ; it must be accompanied by delivery of possession.

(*b*) Under the Mussalman Wakf Validating Act, 1913, a Hanafi Mussalman can create *wakf* for his own maintenance and support during his life-time, but this benefit is not conferred on a Shia Muslim.

9. Pre-emption : (*a*) Under the Shia Law the only persons, entitled to the right of pre-emption are co-sharers, and that too if the number does not exceed two, while under the Sunni Law the right of pre-emption can be claimed on the ground of vicinage and participation in appendages also.

(*b*) *Talab-i-ishhad* is not recognised in Shia Law. *Talab-i-mowasibat* alone is sufficient.

CHAPTER 13

PRE-EMPTION / Shufaa

Q. 122. Define Pre-emption under the Islamic Law.

Ans. Pre-emption : The technical Arabic term for its Anglo-Mohammadan enquivalent pre-emption' is "Shufaa" "Shufaa literally means adding. In law pre-emption is defined as 'a right which the owner of certain immovable property, possesses, as such for the quiet enjoyment of that immovable property, to obtain in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as these on which such latter immovable property is sold to another person' Thus pre-emption is the right which the owner of an immovable property possesses to acquire another immovable property for the price for which it has been sold to another person. The definition as it stands seems very difficult and complicated But the fact that this definition is most scientific and comprehensive an explanation of it will greatly facilitate its understanding.

Definitions : Defintions of Preemption is as under ;

Mulla defines : "The right of *shufaa* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person".

Mahmood, J., says ".....a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person".

Q. 123. State briefly general rules of Pre-emption.

General rules of pre-emption : The right of Shufaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase of another's immovable property has been sold to another such person.

Persons entitled to claim pre-emption : Following persons are entitle to claim Pre-emption :--

(*i*) A co-sharer in the property (*Shafi-i-Sharik*) ;

(*ii*) a participator in immunities and appendages, such as a right of way or a right to discharge water (*Shafi-i-Khalit*); and

(*iii*) owners of adjoining immovable property (*Shafi-i-Jar*) but not their tenants, nor persons in possession of such property without any lawful title.

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed

The right of pre-emption on the third ground, *viz.*, that of vicinage does not extend to estates of large magnitude, such as villages and zamindaris, but is confined to houses, gardens, and small parcels of land The right, however may be claimed by a co-sharer.

When right of pre-emption arises : Right of pre-emption arises only out of a valid, complete, and *bona fide* sale. It does not arise out of gift (*hiba*), sadaqah *wakf* inheritance, beguest, or a lease even though in perpetuity Nor does it arise out of a mortgage even though it may be by way of conditional sale; but the right will accrue, if the mortgage is foreclosed. An exchange of property between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life stands on the same footing as a conditional sale such an exchange does not extinguish the ownership in the property, and does not give rise to the right of pre-emption But if one of the parties dies without cancelling the exchange, the transaction will mature into two sales and will give rise to the right of pre-emption. The right of pre-emption arises not only out of a private sale, but also out of a sale by Court or a receiver.

Pre-emption in case of a sale to Shafi : Where there are two or more Shafis of the same class, and the sale is made by one of them to another, the other Shafis are entitled to claim pre-emption of their share against the Shafi purchaser. Similarly, where the sale is made to a Shafi and a stranger, the other Shafis are entitled to claim pre-emption of their share against the Shafi purchaser and the stranger

Demand for pre-emption : No person is entitled to the right of pre-emption unless--

(*i*) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called *talab-mowasibat* (literally, demand of jumping, that is, immediate demand) , and

(*ii*) he has with the least practicable delay affirmed the intention referring expressly to the fact that the *talab-i-mowasibat* had already made and has made a formal demand :

(*a*) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and

(*b*) in the presence at least of two witnesses. This formality is called *talab-i-ishhad* (demand with invocation witnesses).

The *talab-i-mowasibat* should be made after the sale is completed. It is of no effect if it is made before the completion of the sale.

It is not necessary that the *talab-i-mowasibat* or *talab-i-ishhad* should be made by the pre-emptor in person. It is sufficient if it is made by a Manager or a person previously authorized by the pre-emptor to make the demand. A demand made by the father or brother of the pre-emptor is not sufficient, even if he has a right to pre-empt, unless he had been previously authorized to make the demand. When the pre-emptor is at a distance, the demand may be made by means of a letter.

If the *talab-i-ishhad* is made in the presence of the buyer, the buyer should then be actually in possession of the property in respect of which pre-emption is claimed.

When two or more persons claim to pre-empt, each one of them should make the demands, unless one of them has also been authorized by the others to do so, and he makes the demands on their behalf also. If a suit is brought by several persons claiming to pre-empt, and only one of them has made the demand on his own behalf the suit will proceed as regards him, but it must be dismissed as to the rest.

Where there are two or more buyers, and the *talab-i-ishhad* is not made in the presence of the vendor or on the property sought to be pre-empted the demand must be made to all the buyer. If it is made only to some of them, the shares of those buyers only can be pre-empted.

No particular formula is necessary either for the performance of *talab-i-mowasibat* or *talab-i-ishhad* so long as the claim is unequivocally asserted.

When once a pre-emptor has made the "demands" required by law, a transfer by the purchaser of the property sought to be pre-empted will not affect the rights of the pre-emptor, and the pre-emptor is not bound to make fresh "demands" against the transferee.

It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the *talab-i-ishhad*, it is sufficient that he should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been actually paid by the buyer.

The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiescence in the sale. But a mere offer by a pre-emptor to purchase from the buyer at the sale price, made with the object of avoiding litigation, does not amount to acquiescence.

If a plaintiff who has a right of pre-emption joins with himself as co-plaintiff a person who has no such right he is not entitled to claim pre-emption, and the suit must be dismissed But the right is not lost if he joins with himself as co-plaintiff a person who, but for his failure to make the necessary demands, would have been entitled to pre-empt.

As the right of pre-emption accrues after the completion of sale, it is not lost because before the completion of sale the property was offered to the pre-emptor and he refused to buy. A *fortiori* it is not lost because he had previous notice of the sale and he made no offer to the seller to buy the property.

As the right of pre-emption arises after the completion of sale, it is not lost because the pre-emptor had notice that the property was for sale and he did not offer to purchase it

Where the property is sold to two or more persons, the pre-emptor may pre-empt the share of any one of them

Q. 124. Explain the grounds of justification for the right of Pre-emption.

Ans. Ground for justification : Mr K.P. Saxena in his book on 'Muslim Law as administered in India and Pakistan' gives the following grounds of justification for the right of pre-emption :--

1. The hardship and inconvenience of a joint owner would be greater than those of a stranger vendee, and in having him as his participator, it may happen that he may be required to abandon his property.

2. The democratic conception underlying the Islamic Law of Inheritance tends to disintegrate the family property and the Law of Pre-emption considerably mitigates the evil.

3. *Sharaya-ul-Islam* has allowed this right, as division would cause loss and damage.

4. The *Hedaya* has given recognition to the right of pre-emption to prevent apprehended inconvenience.

5. It prevents the vexation arising from a disagreeable neighbour.

Q. 125. Who can claim the right of pre-emption ?

Ans. Right of Pre-emption under Sunni Law : Under the Sunni Law, the right of pre-emption can be claimed by the following persons :--

(a) *Shafi-i-Sharik*, a co-sharer or a partner in the property sold ;

(b) *Shafi-i-Khalit*, a participator in the immunities and appendages of the property such as the right to water and roads, or a common access and

(c) *Shafi-i-Jar*, a neighbour or owner of adjoining immovable property but not their servants, nor persons in possession of such property without lawful title.

The first class excludes the second, and the second class excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares to the property in respect of which the right is claimed. It may be noted that the right of pre-emption on the third ground, *i.e.*, that of vicinage cannot be claimed in respect of estates of large magnitudes such as villages and zamindaris, but is confined to houses, gardens and small parcels of land. The right can, however, be claimed by a co--sharer.

Shia Law : Under the Shia Law, the right of pre-emption is restricted only to co-sharers, and that also where their number is two. It does not recognize the right on the ground of vicinage or on the ground of participation in appendages.

Shafei Law : The Shafei Law reecognises the right of pre-emption only among the co-sharers.

Q. 126. "The right of pre-emption given to a co-sharer has obvious advantages." Discuss.

Ans. The right of pre-emption given to a co-sharer or a *Shafi-i-Sharik* has obvious advantages. It is the desire of every community to maintain the integrity of its property and to avoid disharmony. If a stranger is allowed to intervene and acquire a part of property, difficulties are likely to be created not for the stranger himself but also for the other co-sharers. Harmonious enjoyment of the joint property, therefore, can be secured only if a co-sharer is given a preferential right to purchase the share of another co-sharer. The grounds on which the recognition of a right of pre-emption in favour of a co-sharer of a village can be based were summarized as follows :

(1) to preserve the integrity of the village and the village community ;

(2) to avoid fragmentation of holding ;

(3) to implement the agnatic theory of the Law of Succession ;

(4) to reduce the chances of litigation and friction, and to promote public order and domestic comfort ; and

(5) to promote private and public decency and convenience.

The considerations are applicable with equal force to co-sharers of property in cities where the Law of Pre-emption is enforceable custom. **A I R 1965 S C 314.**

Q. 127. Right of pre-emption is allowed under Islamic Law on the basis of reciprocity inter partes to a pre-emption claim. Justify.

Ans. Right of Pre-emption on basis of reciprocity inter partes : The rights and obligations created by the Islamic Law of Pre-emption, as indeed by every other system of law, must necessarily be reciprocal.

Law of Pre-emption contemplates both a right and obligation. Hence the vendor and the pre-emptor should both be Muslims, for if a non-Muslims were allowed to pre-empt, it would be allowing him the right without the corresponding obligation.

Shia Muslim was not entitled to maintain a claim for pre-emption based on the ground of vicinage when the vendor was a Sunni. In Shia Law a neighbour as such has no right of pre-emption and that if he were allowed to pre-empt, he might sell his house to any one he liked and his Sunni neighbours could not successfully assert any right of pre-emption against him.

Q. 128. On what ground, if any, can a suit for pre-emption be defeated ? Also state the devices, if any, to defeat a suit for pre-emption.

Ans. Grounds on which suit for pre-emption can be defeated : The suit for pre-emption shall be defeated on any one or more of the following grounds : ---

(*a*) The transfer is not a complete sale.

(*b*) The vendee has a superior right of pre-emption.

(*c*) The pre-emptor has joined in suit as plaintiff a person who has no right of pre-emption.

(*d*) The pre-emptor, though entitled to pre-empt the whole, sues only for a share.

(*e*) Necessary demands have not been made

There are several devices for avoiding a claim of pre-emption. Some of these have legal recognition. They are : ---

(1) Leaving unsold a strip of land along the boundary of the pre-emptor's land so that his land actually does not adjoin the portion sold. It can defeat only a neighbour.

(2) Transfer in the form of *Hiba-bil-iwaz* (not of a sale) the land being nominally the subject of gift and the consideration of the iwaz.

(3) Giving a portion of the land to the purchaser prior to sale, by way of gift, demarcating or dividing it off with the right of way thereto, common to the seller and the purchaser.

(4) Sale with an option of repurchase, *etc.*, *etc.*

Q. 129. What are characteristics of sale giving rise to pre-emption.

Ans. Characteristics of sale giving rise to pre-emption : Right of pre-emption does not arise out of gift, charity, inheritance, or bequest. It must be a sale where---

(*i*) there must be an exchange of immovable property for money or property; and

(*ii*) there must be an actual transfer of ownership from the vendor to the vendee.

Right of pre-emption does not arise in the following cases:

(*i*) A contract to sell at a future time;

(*ii*) A sale with reservation (to either vendor or vendee) of an option of repudiation ;

(*iii*) A lease, even in perpetuity.

As sale alone gives rise to the right of pre-emption, it is important that the exact point of time, when the sale is said to be complete, is known.

Q. 130. What formalities are necessary to enable a Muslim to enforce his right of pre-emption ?

Ans. Necessary formalities: The right of pre-emption arises only when the pre-emptor, on hearing of the transfer, makes the following demands in the order given below :--

1. *Talab-i-mawasibat* or immediate demand (literally means demands by jumping) by which he should declare his intention to assert the right immediately on receiving the information of sale. Therefore the right of pre-emption must be asserted with the utmost promptitude. A delay of twelve hours was held in an Allahabad case to be too long.

2. *Talab-i-ishaad* or demand with invocation of witnesses. When the right mentioned above has been asserted, the pre-emptor should, with the least practicable delay, affirm his intention either in the presence of the buyer or the seller or on the premises which is the object of sale, in presence of witnesses specifically called to bear witness to the demand being made. Reference must be made to the demand already made, that is, to the *talab-i-mawasibat*.

3. *Talab-i-tamlik* or demand of possession by the person claiming pre-emption by which he finally enforces his claim by a regular suit within the period prescribed, *vide* Limitation Act **Sch. I. Art. 10.**

Under the Shia Law the distinction between *talab-i-mawasibat* and *talab-i-ishaad* is not recognised ; all that is necessary is that the pre-emptor should prefer his claim.

Q. 131. What are the Legal effect of pre-emption.

Ans. Legal effect of pre-emption : Legal effect of Pre-emption are :

(*i*) When the claim of pre-emption is complete, the pre-emptor steps in the shoes of buyer.

(*ii*) If the sale has been completed when the claim to the right

of pre-emption is enforced, the original buyer becomes the new seller, and the pre-emptor as the new buyer.

(iii) The pre-emptor does not become liable for any contingent charges incurred by the buyer, such as brokage or agency.

(iv) The buyer is entitled to receive or retain the rents and profits of the land during the interval between the date of its sale to himself, and its transfer to the pre-emptor.

(v) As the pre-emptor takes the property from the buyer, and not the seller, the buyer must always be a party to the suit. But after the pre-emptor has taken possession of the land, there is not need of seller.

(vi) If before the sale is complete, and the pre-emptor claims it from the buyer, he may say to the pre-emptor, to take it direct from the seller.

Q. 132. What is the difference between the Sunni and Shia Laws of Pre-emption ?

Ans. Difference between Sunni and Shia Laws of Pre-emption : The basic difference between the Sunni and Shia Laws of Pre-emption is that according to the Shia Law no right of pre-emption exists in the case of property owned by more than two co-sharers nor on the grounds of vicinage or participation in appendages. The Sunni Law, however recognises such a right, in a partner in the property, in a sharer in immunities and appendages" and in a neighbour, namely a person who owns the adjoining property. The right vests in (1) a partner in the property of the land sold. (2) a partner in immunities and appendages of the land (such as the right to water and to roads) and (3) in a neighbour. Where the plaintiff's claim the right on account of ownership of adjoining land and also on the ground that they had a right to irrigate their land by the same water-course by which the land in dispute was irrigated. Such a right, though recognised by Sunni Law was not recognised by the Shia Law.

Conflict of Sunni and Shia Law--which Law to apply : It is not the law of the vendee which would apply to pre-emption case, because the right of pre-emption is not a personal right and being in the nature of a limitation on the power of the vendor it is the vendor's law or that of the pre-emptor which would apply. The sect-law applicable to pre-emption cases shall be as follows :--

(1) Where the vendor and the pre-emptor are both of one sect (either Sunni or Shia) the law of their sect shall apply.

(2) If the pre-emptor is a Shia and the vendor is a Sunni, the Shia Law shall apply.

(3) If the pre-emptor is a Sunni and the vendor is a Shia, the Shia Law shall apply.

CHAPTER 14

Administration of Estates & Payments of Debts

Q. 133. Write a detail note on Administration of Estate.

Ans. Administration of Estate : Duty of administering an estate, according to the law of Islam, rests on the State, acting through the *kazi*. Hence it is correct to say that administration as understood in modern law, involving necessarily the recognition of an executor or the appointment of an administrator, was unknown to Islamic jurisprudence.

"Administration was introduced into the fabric of Muhammadan Law by the reception of the English concept of administration and later by the enabling provisions of the Probate and Administration Act, 1881."

According to the Muslim legal theory, the property of a deceased Muslim vests in his heirs immediately after his death. But it is subject to the injunction that the heirs are entitled to take only that residue which is left after the payment of a legacy or debt. Since the payment of debts and legacies necessarily involves the administration of the estate, such administration may be said to be implied in the very spirit of Islamic Law itself.

Islamic Law recognizes four distinct purposes to which the estate of the deceased is successively applicable :

(1) his funeral expenses ;

(2) his debts ;

(3) his legacies ; and

(4) the claim of his heirs.

But Islamic Law is replaced by the Succession Act, 1925, which lays down the following scheme of the order of priority in which the payments are to be made :

(1) Funeral expenses and death-bed charges ;

(2) Expenses of obtaining probate or letters of administration ;

(3) Wages for services rendered to the deceased by a labourer or servant within three months of his death ;

(4) Debts, according to their own priorities (discussed latter on in this chapter) ;

(5) Legacies, not exceeding one-third of what has been left after payments of items mentioned in (1) to (4) above.

This brings us to the consideration of an important question :

whether vesting of the estate in the heirs takes place immediately on the death of the propositus or is dependent upon the payment of debts.

Q. 134. Write a note on legal representative of deceased Muslim.

Ans. Legal representatives of a deceased Muslim : (*i*) *In case the deceased leaves a 'will--his executor* (*wasi*), to the extent to which the 'will' is valid ;

(*ii*) *If he dies intestate* (*i.e., there is no 'will'*)--(*a*) *the administrator,* to whom the Court has granted the letters of administration; failing whom ;

(*a*) *the heirs.*

When legal representatives can act : It is not necessary for the heirs or administrator of a deceased Muslim to obtain letters of administration or for his executor to obtain a probate of will, if they are doing anything except the realization of debts.

The legal representatives cannot obtain a decree or execute a decree for the recovery of debts due to the deceased, unless they obtain :

(*i*) a probate of will (if there is a will) or, letters of administration (if there is no will), or

(*ii*) a certificate under any of the following Act, namely :

(*a*) Succession Act, 1925.

Functions of legal representatives : All the properties of a deceased Muslim vest in his legal representative as such. It is his duty to collect the assets, discharge the debts, pay the legacies and distribute the estate amongst the heirs. In case of an executor, his powers granted by will extend to the equatable third only, while the rest two-third of the estate he holds as a trustee for the heirs. While in case of an administrator, his functions extend to the collection of property and debts due to the deceased, and paying his funeral expenses and debts due by him. The rest of the estate vests in him as a bare trustee for the heirs.

Power of alienation by heir : An heir may, even before the distribution of the estate, transfer his own share and pass a good title to a *bona fide* transferee for value, notwithstanding any debts remaining unpaid by the deceased.

But one of several heirs of a deceased Muslim, though he may be in possession of the whole of the estate of the deceased, has no power to alienate the share of his co-heirs, not even to pay off the debts of the deceased. Such a transfer affects only his own share, and does not affect the rights of the other heirs and creditors.

(*Fyzee, 374, 374*)

Q. 135. Write a note on Propositions regarding payment of Debts.

Ans. Payment of Debts : In *Jafri Begum* v. *Amir Muhammad Khan*, **I L R 7 All. 822,** Mahmood, J., laid down three propositions regarding the payment of debts :--

Proposition I : When a Muslim dies leaving debts unpaid, his estate devolves immediately on his heirs, and such devolution is not suspended till or contingent upon the payment of debts.

Proposition II : A decree for a debt passed against such of the heirs as are in possession of the estate does not bind the other heirs.

Proposition III : If one of the heirs, who was out of possession and who was not a party to the proceeding brings a suit against the decree-holder for the recovery of his share of the estate, he must pay his proportionate share of the debt before recovering possession of his share of the inheritance.

Proposition I came under judicial scrutiny in *Abdul Majeed* v. *Krishnamachariar*, **I L R 40 Mod. 243,** Mr. Justice Abdur Rahim (author of the famous *Muhammadan Jurisprudence*), approved it and observed :

"It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies have been paid. This is evident from the following facts: if an heir designated by the law dies after the death of the propositus, his share descends on his own heirs and does not lapse to the general estate. Each heir is entitled to the income that has accrued since the testator's death, in proportion to his share, and he can transfer his share by sale or gift, subject, it may be, as to the latter form of disposition to such restrictions as are imposed by the doctrine of *Musha*.

Alienation before payment of debt : (*i*) Any heir may, even before distribution of the estate, transfer his own share, and pass a good title to a *bona fide* transferee for value, notwithstanding any debts that might be due from the deceased.

Illustration

A Muslim dies leaving several heirs. After his death the whole body of heirs sell the whole of his estate without paying his debts. After the sale, a creditor of the deceased obtains a decree against the heirs for the debt, and applies for execution of the decree by an attachment and sale of the property in the hands of the purchaser. He is not entitled to do so. The reason is that a creditor of a deceased Muslim cannot follow his estate into the hands of a *bona fide* purchaser for value. (*Mulla*)

(*ii*) A sale of the share of an heir in execution of a decree amounts to a "transfer", and will pass a good title to the purchaser.

Illustration

A Muslim dies leaving two sisters as his only heirs. After his death, *C* a creditor of the deceased, obtains a decree against the sisters for his debt. Subsequently a creditor of the sisters obtains a decree against them for his debt, and the property of the deceased which came to the sisters' hands is sold in execution of the decree to *P*. In this case *C* is not entitled to attach the property in the hands of *P* in execution of his decree.

(*iii*) If the share transferred by an heir is a share in immovable property, and the transfer is made during the pendency of a suit in which a decree is passed creating a "charge" on the estate, the transferee will take share of the heir subject to the charge.

Illustration

A Muslim died leaving a widow and a son. The widow sued the son, who was in possession of the deceased's properties, for the payment of her dower debt. The Court passed a decree in favour of the widow. The decree created a charge on the immovable properties of the estate. But during the pendency of the execution of the decree, the son mortgaged his share to *M*, who later on sued the son and obtained a decree for sale of the shares mortgaged to him. The share was sold and was purchased by *P*, who had notice of decree. In these circumstances, *P* will take the share subject to the decree in favour of the widow, whose right to claim unpaid dower cannot be so defeated.

Extent of liability of heirs for debts : Each of the heirs of a deceased Muslim is liable for payment of his debts proportionately to his share in the estate of the deceased. This liability of heirs, however, is only up to the extent of the estate of the deceased.

Illustration

A Muslim who is under a debt of Rs. 3,200, dies leaving a widow, a son and two daughters. They divided the estate without paying the debt the widow taking 1/8, the son 7/16, and each daughter 7/32. The creditor sues the widow and the son for the whole of the debt, *i.e.*, Rs. 3,200. But the widow is liable to pay only (1/8 x 3200 = 400) Rs. 400, and the son (7/16 x 3200 = 1400) Rs. 1,400. They are not liable for the whole amount of debt.

Suit by the creditor against heirs : In the absence of an executor or administrator, the creditor may proceed against the heirs of the deceased. There is a conflict of opinion as to whether a decree obtained by a creditor against some of the heirs of the deceased is binding on the other heirs.

CHAPTER 15

Inheritance

Q. 136. State the General Rules of Inheritance under the Islamic Law.

Ans. General Rules of Inheritance : Following are the general rules of the inheritance under the Islamic Law :

(1) There is no distinction in the Islamic Law of Inheritance between movable and immovable property or between ancestral and self-acquired property.

(2) The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor.

(3) According to the Sunni Law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under this will. According to the Shia Law, it does pass by succession in some cases.

(4) The chance of Muslim heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release.

(5) A "vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death.

(6) When the members of a Muslim family live in commensality, they not form a joint family in the sense in which that expression is used in the Hindu Law.

(7) Under Islamic Law of Inheritance, one of the impediment to inherit is homicide. Slayer is deprived to inherit the victim. This principle is based on Hadith ( ) (a murderer is excluded to inherit). This principle applies in cases of (*i*) wilful murder (Qatl-e-Amd); (*ii*) 'Qatle-e-Shibh-ul-Amd' ; (*iii*) 'Qatle-ul-Khata' ; (*iv*) Qatl Qaim Maqam-ul-Khata. The second aspect of the view is that not only a murderer, his whole line of descendants is excluded to inherit. This is so, as murderer is deemed to be existent or non-existent. Thus, no person can claim inheritance through murderer. **P L D 1981 Azad J & K 49.**

Homicide under the Shia Law is not a bar to succession unless the death was caused intentionally.

Q. 137. State what is meant by Spes Successionis under the Islamic Law ?

Ans. Spes Successions : Under the Islamic Law, son or any

other possible heir, does not acquire any interest in the property of a person by birth. The right of an heir presumptive comes into existence for the first time only on the death of the propositus. During the life-time of the propositus, his heirs presumptive have no transferable interest in the property.

In *Hasan Ali* v. *Syed Ali,* 12 O.L.L.J., Straight, J. observed, "The Muslim Law does not recognise any reversionary inheritance or contingent interest expectant on the death of mother, and till the death occurs, which, by force of that law, gives birth to the right as heir in the person entitled to according to the rule of succession, he possesses no right at all."

This rule of Islamic Law is not different from the law under the Transfer of Property Act, Section 6 (*a*) of which provides, "The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

Thus it is explicitly clear that in the Muslim system as in the Roman and English Laws, the principle, 'NEMO EST HERES VIVENTIS' a living person has no heir, is recognised.

Illustration

A has a son *B* and a daughter *C*. *A* pays Rs. 1,,000 to *C*, and obtains from her a writing whereby in consideration of Rs. 1,000 received by her from *A*, she renounces her right to inherit *A's* property. *A* then dies, and *C* sues *B* for her share of property left by *A*. *B* sets up in defence the release passed by *C* to her father. The release is no defence to the suit, and *C* is entitled to her share of inheritance as the transfer by her was a transfer merely of a SPES SUCCESSIONIS, and as such, inoperative. But *C* is bound to bring into account the amount received by her from her father. **I L R 31 Bom. 165.**

Whereas expectation of a right to inherit is neither heritable nor transferable, its relinquishment has been held valid under certain circumstances. An heir may be estopped by his conduct from claiming the inheritance, he has agreed to relinquish if the release was part of a compromise or family settlement and if he has benefitted by the transaction.

Illustration

A husband gives immovable property to his wife in lieu of his dower and agrees not to claim any share of it as her heir on death the agreement was held valid and binding on the husband'. **ILR 33 All. 457.**

Q. 138. State the Principles regarding exclusion from inheritance.

Ans. Principle regarding exclusion : The "Sirajiyyah" sets out the following four grounds of exclusion from inheritance :--

(*i*) Homicide : According to Sunni Law a person who causes the death of another either intentionally or accidentally, cannot succeed to the latter. Under Shia Law, however, homicide to be an impediment to inheritance must be intentional and not accidental. This rule of exclusion from inheritance is based on public policy.

(*ii*) Slavery : Under the Muslim Law, a slave cannot succeed. But slavery has since been abolished by the Government of India Act, 1843, and it has only an academic value now.

(*iii*) Difference of Religion : Infidelity or change of religion was a ground of disability. But since the passing of Freedom of Religion Act, infidelity has ceased to be an impediment.

(*iv*) Difference of allegiance : The heirs of the deceased cannot inherit his estate, if they do not owe allegiance to the country to which the deceased owed allegiance.

Besides the above four grounds of exclusion, there are the following other grounds :

(*a*) Illegitimacy : An illegitimate child is not entitled to inherit at all according to the Shia Law. But he can inherit from the mother and her relations in the absence of a legitimate issue but can, in no case, inherit from the father or his relations according to the Sunni Law.

An illegitimate child.--

(*i*) is *matris filius* according to the Sunni Law and as such, in the absence of legtimate issue, it inherits from its mother and her relations once they inherit from the child, it cannot inherit to its putative father or relations on the father's side ;

(*ii*) is *nullis filius* accoridng to the Shia Law and therefore, it does not inherit even from its mother and her relations, they cannot inherit from it.

(*b*) Estoppel in Succession : Denial of relationship stops the mutual right to inheritance.

Q. 139. What is the Islamic Ideology regarding the distribution of the property of the deceased ?

Ans. Distribution of property of deceased : The distribution of the residue among the successors of a deceased person is a duty attached to the estate notwithstanding that it vests in the heirs at the time of the death of the propositus, and as the distribution of the residue forms part of the administration suit. Even the Divine Book upon which the Sirajiyyah relies insists on administration before the

heritage ever devolves on the heirs. The theory that the property of a deceased Muslim vests in his heirs immediately after the death is considerably tempered by the injunction that the heir is entitled only to the residue after the payment of a legacy or debt, and since the payment of debts and legacies necessarily involve the administration of the estate, such administration is implied in the very words of the Holy Qur'an and of authentic texts like the Sirajiyyah. If there is any estate to be administered in any form (excluding, of course, cases relating purely and obviously to rival claims), an administration suit would not only be competent, but often desirable.

The Holy Qur'an places great stress upon the payment of debts and legacies before the estate is divided among the heirs-at-will.

Q. 140. State the grounds on which the right of inheritance is based under the Hanafi Law and the rules of distribution among the heirs.

Ans. Ground on which right of inheritance is based : The following are the grounds on which the right of inheritance is based :--

(1) Sabab, or valid marriage, on which account there are only two sharers, the husband or the wife; (2) Nasab, or consanguinity shares by relationship, and their number is ten ; (3) Wala or fictitious relationship, special cause of inheritance.

The general rules of inheritance among the heirs are as follows :

(1) The claimants possess the right to inheritance due to any relationship with the propositus. (2) The claimant is excluded by existence of any preferable heir. (3) The nearer in degree excludes the more remote. (4) There is no representation. (5) The strength of consanguinity determines preference. (6) As a general rule the male sharer takes double the portion of a female sharer of the same degree.

The particular rules of distribution of the estate of a deceased Muslim among his blood relations are :--

(1) If there is any sharer or residuary (*a*) the sharers take their shares, and thereafter (*b*) the residue is taken by (*i*) the residuaries, if any , or failing them, (*ii*) the sharers.

(2) In the absence of sharers or residuaries the whole estate is distributed amongst the "distant kindred".

Q. 141. What are the classes of heirs recognised by Hanafi Law ?

Ans. Classes of heirs : Hanafi jurists divide heirs into seven classes, the three principal and the four subsidiary classes (*Fyzee, 389*) --

Principal Classes : (*i*) Qur'anic Heirs (Sharers) ;

(*ii*) Agnatic Heirs (Residuaries) ;

(*iii*) Uterine Heirs (Distant Kindred).

Subsidiary Classes : (*iv*) The successor by contract ;

(*v*) The Acknowledged kinsman ;

(*vi*) The Sole Legatee ;

(*vii*) The State, by Escheat.

The first step in the distribution of the estate of a deceased Muslim, after payment of his funeral expenses, debts and legacies, is to allot their respective shares to the Qur'anic heirs. If any residue is left, it is to be divided among Agnatic heirs (Residuaries). If there be neither Sharers nor Residuaries, the estate will be distributed among Distant Kindred. *The Distant Kindred are not entitled to succeed so long as there is any heir belonging to the class of Sharers or Residuaries*. But there is one case in which the Distant Kindred will inherit with a Sharer, and that is when the Sharer is the wife or husband of the deceased. (*Mulla, 57*).

In the absence of a member of the three principal classes (*i.e.*, Qur'anic, Agnatic and Uterine heirs) the right of inheritance devolves upon subsidiary heirs, *among whom each class excludes the next*.

Successor by contract is a person whose right of inheritance is based on a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom. Fyzee says that it is merely of antiquarian interest, because compensation for criminal offences is not payable in India. (*Fyzee, 394*).

Acknowledged Kinsman is a person of unknown descent in whose favour the deceased has made an acknowledgment of Kinship, not through himself, but through another. Consequently, a man may acknowledge another as his brother (descendant of father), or uncle (descendant of grandfather), but not as his son. (*Fyzee, 394*)

Universal legatee : In the absence of three classes of Principal heirs and the above described classes of two Subsidiary heirs, a person is entitled to bequeath the whole of his estate to any person, who is called the Universal legatee.

The State, by Escheat : In the absence of either Principal or Subsidiary heirs, and a will, the whole of a estate of a deceased would escheat to the Government

(*i*) **Sharers :** Students are advised to remember the shares of each of the sharers in the following table. The division of inheritance much depends upon it.

TABLE OF SHARERS

Sharers	Share	Conditions under which the share is inherited	Whether excluded or converted into a residuary
1. Husband	1/4	When there is a child or child of a son h.l.s	Excluded by none.
	1/2	When there is no child or child of a son h.l.s.	
2. Wife (one or more)	1/8	When there is a child or son's child h.l.s.	Excluded by none.
	1/4	When no child or son's child.	
3. Daughter	1/2	if one when there	Excluded by none.
	2/3	if two or more	is no son.
	Residue		Converted into a residuary if there is a son or two or more sons.
4. Son's daughter	1/2	if one when no son. or son's son	Excluded by (*i*) son or son's
	2/3	if two or more or more daughters or higher son's daughter.	son of higher grade (*ii*) two or more daughters or by two or more sons' daughters of higher grade. (*iii*) or by one daughter together with two or more son's daughters of higher grade.
	1/6	When there is a daughter or higher son's daughter.	
	Residue		Converted into a residuary by son's son of equal or even lower grade.
5. Father	1/6	When there is a son or son's son (h.l.s.)	Excluded by none.
	1/6 plus Residue	When there are one or more daughter son's daughters or if there is no son or son's son	In this case the father is a sharer and also a residuary.

	Residue	When no child nor son's child h.l.s.	Converted ihto residuary in the absence of any child
6 Mother	1/6	When there is a child or son's child (h.l.s) or two or more brothers or sisters whether full blood or half and whether they inherit or are excluded or there is a brother and sister and the father.	Excluded by none.
	1/3	When there is no child nor son's child and not more than one brother and sister.	
	1/3 of Residue	When there is a wife or husband and the father.	Converted into a residuary by the father.
7. True grand-father	1/6	When there is a child or son's child (h.l.s.) and no father or nearer true grand-father.	Excluded by the father or nearer true grand-father.
	1/6+ Residue	When with daughters or only son's daughters.	
	Residue	When no child nor son's child.	Converted into a residuary if there is no descendant sharer or residuary.
8. True grand-mother	1/6	When no mother and no nearer true grandmother	Paternal true grandmother excluded by father or by a true grandfather. Any true grand-mother is excluded by mother or by nearer true grand-mother, whether paternal or maternal. Not residuary.

9. Full sister	1/2 1/3	If one If two or more.	When no child or son's child (h.l.s.) or father or brother.	Excluded by son or son's son (h.l.s.) father or true grandfather. Also excluded as share by one or more daughter or son's daugh-ters
	Residue			Converted into residuary by full brother, that is when with one or more full brothers subject to not being excluded or when with one or more daughters or son's daughters and no excluder, the full sisters one or more become residuaries with daughters, *i.e.*, they take the residue after deducting the shares of daughters.
10. Consangine sister	1/2 1/3	If one If two or more	When no child or son's child (h.l.s.) father or brother or full sister.	Excluded by son or son's son, father or true grand-father or by full brother of by full sister when she is a residuary.
	1/6	When with one full sister only, the sister takes 1/2 and consanguine sister takes (2/3--1/2) = 1/6.		Also excluded by one or more daughters or son's daughters or by two or more full sisters.
	Residue			Converted into residuary by a consanguine brother. When there are one or more daughters, or son's daughters and no excluder.
11 12. Uterine brother or sister	1/6 1/3	If one If two or more	When no child or son's child (h.l.s.) father (h.h.s.)	Excluded by son or son's son father or true grandfather, or daughter or son's daughter. Never converted into a residuary

9. Full sister	1/2 1/3	If one If two or more.	When no child or son's child (h.l.s.) or father or brother.	Excluded by son or son's son (h.l.s.) father or true grandfather. Also excluded as share by one or more daughter or son's daugh-ters
	Residue			Converted into residuary by full brother, that is when with one or more full brothers subject to not being excluded or when with one or more daughters or son's daughters and no excluder, the full sisters one or more become residuaries with daughters, *i.e.*, they take the residue after deducting the shares of daughters.
10. Consangine sister	1/2 1/3	If one If two or more	When no child or son's child (h.l.s.) father or brother or full sister.	Excluded by son or son's son, father or true grand-father or by full brother of by full sister when she is a residuary.
	1/6	When with one full sister only, the sister takes 1/2 and consanguine sister takes (2/3--1/2) = 1/6.		Also excluded by one or more daughters or son's daughters or by two or more full sisters.
	Residue			Converted into residuary by a consanguine brother. When there are one or more daughters, or son's daughters and no excluder.
11. 12. Uterine brother or sister	1/6 1/3	If one If two or more	When no child or son's child (h.l.s.) or father. (h.h.s.)	Excluded by son or son's son. father or true grandfather, or daughter or son's daughter. Never converted into a residuary.

(*a*)	Father	1/6	(as sharer, because there are daughters).
	Father's Father		(excluded by father).
	Mother	1/6	(because there are daughters).
	Mother's Mother		(excluded by mother).
	Two daughters	2/3	———
	Son's daughter		(excluded by daughters).
(*b*)	Four widows	1/4	(each taking 1/16).
	Father	3/4	(as residuary).
(*c*)	Mother	1/6	(because there are two sisters).
	Two sisters		(excluded by father).
	Father	5/6	(as residuary).
(*d*)	Mother	1/6	(because there is a brother and also a sister).
	Brother		(excluded by father).
	Sister		(excluded by father).
	Father	5/6	(as residuary).
(*e*)	Father's mother Mother's mother's		(excluded by father).
	Mother		(excluded by father's mother who is a nearer true grandmother).
	Father		(takes the whole as residuary).

Note : In the illustrations (*c*), (*d*) and (*e*) above, the position of other is affected by other heirs. This is because of the rule that a *erson, though excluded from inheritance, may exclude others holly or partially.* In illustrations (*c*) and (*d*), the exclusion of mother only partial, but in (*e*), it is total. In illustration (*d*), the brother and ster, though they are excluded from inheritance by the father, event the mother from taking the larger share 1/3. Similarly, in ustration (*e*), the father's mother, though she is excluded by the her, excludes the mother's mother.

(*f*) Husband 1/2

Mother 1/6 (1/3 of 1/2)

Father 1/3 (as residuary).

Note : In the absence of husband and father, the mother would have taken 1/3, as there are neither children nor brothers nor sisters. Here, the husband share is 1/2, and what remains is 1/2, and out of this 1/2, mother takes 1/3, hence, 1/3 of 1/2 = 1/6.

(*g*) Widow 1/4

Mother 1/4 (1/3 of 3/4)

Father 1/2 (as residuary).

Note : Here, the mother is only entitled to 1/3 of the remainder after deducing the window's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4 = 1/4.

(*h*) Father's Mother 1/6

Mother's mother's mother (excluded by father's mother who is a nearer true grandmother).

Father's Father 5/6 (as residuary).

(*i*) Father 1/6 (as sharer).

Mother 1/6.

3 Son's daughters 2/3 (each taking 2/9).

Note : In the above illustration, if one of the daughters is from one son, and two from other son, the position will remain the same. The son's daughters take *per capita* and not *per stripes*.

(*j*) Father 1/6

Mother 1/6

2 son's daughters 2/3

Son's son's daughter (excluded by son's daughters).

(*k*)	Father	1/6	
	Mother	1/6	
	Son's daughter	1/2	
	Son's son's daughter	1/6.	

Note : Illustrations (*j*) and (*k*) are similar except that in (*k*) there s only one son's daughter, co-existing with the son's daughter. Here he former does not exclude the latter. But they are regarded as two son's daughters. As the share of one son's daughter is fixed as 1/2, she takes this much. Now, as the combined share of two son's daughters is 2/3, and as 1/2 has been taken out from it by the son's daughter, hence, 1/6 remains (2/3--1/2=1/6), which is taken by son's daughter. This is a typical case and must be carefully remembered.

(*l*)	Mother	1/6	
	2 full sisters	2/3	(each taking 1/3).
	Consanguine sister		(excluded by full sister).
	Uterine brother	1/6	
(*m*)	Full sister	1/2	
	2 Consanguine sisters	1/6	(each taking 1/12).
	Uterine brother	1/3	(each taking 1/6).
	Uterine sister		

Note : The consanguine sisters are not excluded because the ull sister is only one. The allotment of shares is based on the same rinciple as discussed in the note to illustration (*k*) above.

Q. 142. What is meant by doctrine of "Increase" or Aul ?

Ans. Doctrine of increase or Aul : If it is found on assiging he respective shares that the total of the shares exceeds unity, then hare of each sharer is proportionately diminished by reducing the actional shares to a common denominator and increasing the

denominator so as to make it equal to the sum of the numerators. In fact, the effect of this process to reduce the shares of all the heirs proportionately. The process is called 'Aul' or 'Increase" because the arithmetical process involves an increase in the common denominator.

Illustration

(*a*) A Muslim woman dies leaving her husband and two full sisters as heirs. The respective shares of the heirs will be as follows :

Husband = 1/2 or 3/6 reduced to 3/7

2 full sisters = 2/3 or 4/6 reduced to $\frac{4/7}{4}$

Total = 7/6 (exceeds unity)

In this case the sum total of 2/3 and 1/2 exceeds unity. The fractions are; therefore, reduced to a common denominator, which, in this case is 6. The sum of numerator is 7 and the process consists in substituting 7 or 6 as the denominator of the fractions 3/6 and 4/6. By so doing, the total of the shares will not exceed unity.

(*b*) A Muslim male dies leaving *W*, a wife, *F* and *M*, both parents and *2 D*, two daughters.

The estate will be divided as under :

W, wife = 1/8 or 3/24

2 D, daughters = 2/3 or 16/24

F, father = 1/6 or 4/24

M, mother = $\frac{1/6 \text{ or } 4/24}{27}$

Total = ---- (exceeds unity)
24

On increasing the common denominator 24 to 27, the shares of the different heirs are proportionately decreased.

W will get 3/27

2 D W will 16/27

F W will 4/27

M W will $\frac{4/27}{27}$

Total- $\frac{\text{-----------}}{27} = 1$

(*c*) A Muslim dies leaving his widow, mother and full sister their respective shares will be as under :--

Widow 1/4 = 3/12 reduced to 3/13

Mother 1/3 = 4/12 " " 4/13

Full Sister	1/3 = 6/12	"	6/13
Total	13/12		13/13 = 1

(exceeds unity)

Q. 143. What heirs are sharers and which of them are not liable to execution ?

Ans. Heirs and Sharers not liable : After the payment of funeral expenses, debts and legacies, the first step is to ascertain which of the surviving relations belong to the class of sharers, and which again are entitled to a share of the inheritance and then to proceed to assign their respective shares.

1. Father : His share is 1/6 where there is a child or a child of a son how-low-soever. Where there is no child or child of son how-low-soever the father inherits as a residuary.

2. True Grand-father : His share is 1/6 when there is child or child of a son how-low-soever and no father or nearer true grandfather. When there is no child or child of a son how-low-soever he inherits as a residuary, provided there is no father or nearer true grandfather.

3. Husband : His share is 1/4, when there is a child or a child of a son how-low-soever, 1/2 when no child of a son how-low-soever.

4. Wife : 1/8 when there is a child or child of a son how-low-soever; 1/4 when no child or child of a son how-low-soever.

5. Mother : (*a*) 1/6 when there is a child or child of a son how-low-soever ; or

(*b*) When there are two or more brothers or sisters, or even one brother and one sister, whether full, consanguine or uterine.

1/3 when no child or child of a son how-low-soever and not more than one brother or sister if any ; but if there is also wife or husband and the father, then only 1/3 of what remains after deducting the wife's or husband's share.

6. True Grand-mother--(*A*) Maternal : 1/6 when no mother and no nearer true grand-mother either paternal or maternal.

(*b*) Paternal : 1/6 when no mother, no father, no nearer true grand-mother either paternal or maternal and no intermediate true grand-father.

7. Daughter : 1/2 when there is only one and there is no son. When there are two or more daughters, they take 2/3 collectively if there is no son. With the son the daughter becomes a residuary.

8. Son's daughter how-low-soever : 1/2 when one, 2/3 when two or more, collectively. These shares are guaranteed only when there is no (1) son, (2) daughter, (3) higher son's son, (4) higher

son's daughter, or (5) equal son's son. When there is only one daughter, or higher son's daughter but no (1) son, (2) higher son's son or (3) equal son's son, the daughter or higher son's daughter will take 1/2 and the son's daughter how-low-soever whether one or more will take 1/6, *i.e.*, [2/3-1/2]. With an equal son's son she becomes a residuary.

(*i*) **Son's daughter :** 1/2 when one and 2/3 when two or more collectivley, provided that there is no son, daughter or son's son. When there is only one daughter, the son's daughter (whether one or more) will take 1/6, if there be son or son's son. With son's son becomes a residuary.

(*ii*) **Son's Son's daughter :** 1/2 when one and 2/3 when two or more collectivley, provided that there is no (1) son, (2) daughter, (3) son's son, (4) son's daughter or (5) son's son's son. When there is only one daughter, or son's daughter the son's son's daughter (whether one or more) will take 1/6 if there be no (1) son, (2) son's son, or (3) son's son's son. With the son's son, tShe becomes a residuary.

9-10. Uterine brother or sister : 1/6 when one and 1/3 when two or more collectively, whent there is no (1) child, (2) child of a son how-low-soever, (3) father, or (4) true grand-father.

11. Full sister : 1/2 when one and 2/3 when two or more collectivley provided that there is no (1) child, (2) child of a son how-low-soever, (3) father, (4) true grandfather, or (5) full brother with the full brother she becomes a residuary.

12. Consanguine sister : 1/2 when one and 2/3 when two or more collectivley when there is no (1) child, (2) child of a son how-low-soever, (3) father or (4) true grandfather, (5) full brother, (6) full sister, or (7) consanguine brother. But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided she is not otherwise excluded from inheritance. With the consanguine brother, she becomes a residuary.

Q. 144. State the general rules regarding exclusion of shares under the Hanafi Law.

Ans. Rules regarding exclusion of sharers under Hanafi Law : Following are the general rules of exclusion :--

(1) A sharer is excluded by any person through whom he is related to the deceased, and who may partake as residuary, for example, the father excludes the true grand-father, full or consanguine sister.

(2) All collateral sharers are excluded by a lineal male descendant or ascendant who can also participate as a residuary, *e.g.*, the son excludes full, consanguine or uterine brothers and sisters.

(3) A remoter sharer is excluded by a nearer residuary who is such as would convert such equally nearer sharer into a residuary, *i.e.*, son and son's son howlowsoever nearer in degree excludes son's daughters in a lower degree.

(4) A half-blood sharer is excluded by a full-blood residuary who can convert such half-blood sharers into residuaries, *e.g.*, consanguine sisters are excluded by full brothers as they convert full sisters into a residuary.

(5) A full-blood female sharer excludes a half-blood female sharer when the former takes as a residuary.

(6) The nearer sharers exclude the more remote sharers, they having taken the maximum collective share fixed for that class.

The nearer in blood excludes the more remote. The rule of propinquity does not operate, unless the heirs belong to the same class; so this rule becomes inapplicable when the members are of different classes. For example, where a Muslim leaves behind two daughters and grandsons by a predeceased son, the former take 1/3 as sharers and do not exclude the latter who, therefore, take 2/3, the residue as residuaries. Similarly a daughter though nearer in degree than the brother's son or his son, does not exclude the latter as they belong to the different classes such as sharers and residuaries respectively.

(7) Similarly half-blood sharers are excluded by full-blood sharers of the same degree and they exhaust the maximum collective share fixed for that class.

(8) When the following three sharers are excluded, they do not forfeit their residuary title, but inherit if not excluded by other residuaries :

(*i*) son's daughter ; (*ii*) full sister, and (*iii*) consanguine sister.

(9) True grand-mother and uterine brother and sister, when excluded as sharers, are absolutely excluded for they are not residuaries at all.

Q. 145. What are classes of heirs recognised by Shia Law ?

Ans. Classes of heirs : According to the Shia Law, there are only two groups of heirs :

(1) Heirs by consanguinity (blood relations) ; and

(2) Heirs by marriage (husband and wife).

(1) Heirs by consanguinity are further divided into three classes :

Class I. (*i*) Parents ;

(*ii*) Children and other lineral descendants h.l.s.

Class II. (*i*) Grand-parents h.h.s. (true and false).

(*ii*) Brothers and sisters and their descendants h.l.s.

Class III. (*i*) Paternal, and

(*ii*) Maternal, uncles and aunts of the deceased, and of his parents and grand-parents h.h.s. and their descendants h.l.s.

The Class I excludes Class II, and Class II excludes Class III. But the heirs of each class; whether they are of sub-class (*i*) or (*ii*), inherit together, the nearer in degree excluding more remote.

Heirs by marriage : Under no circumstances the husband or wife may be excluded. They inherit together with the nearest consanguine heirs.

Sharers and Residuaries in Shia Law : Shias divide heirs into two classes, namely Sharers and Residuaries; there is no class corresponding to the "Distant Kindred" of Sunni law.

The division of heirs into the above two classes is for the purposes of determining the shares of individual heirs.

There are nine Sharers who take specific shares as shown in the table below. The descendands (h.l.s.) of Sharers are also Sharers.

Those heirs who are not included in the class of Sharers are all Residuaries. The descendants (h.l.s.) of Residuaries are also Residuaries.

TABLE OF SHARERS (Shia Law)

(Mulla, p. 103)

Sharers	Normal share		Conditions under which the share is inherited	Share as varied by special circumstances
	of one	of two or more collectively		
1. Husband	1/4	..	When there is a lineral descendant.	1/2 when no such descendant.
2. Wife	1/8	1/8	When there is a lineal descendant.	1/4 when no such descendant.

3. Father (d)	1/6	..	When there is a lineal descendant.	(If there be no lineal descendant the father inherits as a residuary.)
4. Mother	1/6	..	(a) When there is a lineal descendant. *or* (b) When there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases.
5. Daughter	1/2	2/3	When no son.	(With the son she takes as a residuary.)
6. Uterine brother 7. Or sister.	1/6	1/3	When no parent, or lineal descendant.	..
8. Full sister.	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father.	(The full sister takes as a residuary with the full brother and also with the father's father.)
9. Consanguine	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father.	(The consanguine sister takes as a residuary with the consanguine brother and also with the father's father.)

Q. 146. How is the Principle of Representation recognized either in Sunni or Shia Law ? If so , to what extent ?

Ans. Principle of Representation : Principle of representation has no place in the Sunni Law of Inheritance. In other words, the expectant right of an heir presumptive does not pass to his heirs. On the death of the heir presumptive in the life-time of the propsitous, the heirs of such an heir presumptive have no right to claim his share in the property of the prospositus, as representing the right of the heir. Thus, if a Muslim dies leaving a son and a number of grandsons by a predeceased son, the surviving son takes the entire inheritance to the exclusion of the grandchildren.

Again, if there be two grandsons through one predeceased son and three grandsons through another predeceased son, all the five

grandsons will take their shares *per capita* and no *per stripes,* that is, each grandson will take a fifth share of the inheritance. If the principle of representation were allowed, the two grandsons will take between them the share of their father, that is, one-half, and the three grandsons through the second son will take the other half between them. The right of representation is recognized to a limited extent in the inheritance of cognates. For instance, half-sisters on the mother's side, when they inherit, take the mother's share.

The principle of representation is recognized in the Shia Law of Inheritance in the sense that the succession is always *per stripes* and not *per capita*. Hence the descendants of a deceased son represent the son and take the share, which he would have taken, if he were living at the time when the inheritance opens. Similarly, the descendants of a deceased daughter represent the daughter, and take the share which she would have taken, if she were living at the time when the inheritance opens. The same principle applies in the case of other relatives also, whether ascendants or descendants. But the descendants of a deceased son or daughter, or of any other deceased relative, do not inherit with the surviving relative of the equal degree, as representing the right of their deceased father or mother. Grandchildren succeed only in default of children, and will be totally excluded by the surviving children. The principle of representation comes into play, therefore, only in dividing the shares of the several heirs equally remote from the deceased, as the division between them would be *per stripes*. Thus if a person dies leaving two grandsons by a deceased son and three grandsons by another predeceased son, and there is no son living at the time, two grandsons would take the half-share which their father would have taken, if he were living, that is, one-fourth each, while the three grandsons by the second son take the half-share of their father that is one-sixth each. Under Sunni Law, it does not recognize the principle of representation, each of the five grandsons would have taken one-fifth.

Section 4 of the Muslim Family Laws Ordinance, 1961 introduces the principle of representation fully so far as the right of succession of the descendants of a predeceased son or daughter with surviving son or daughter concerned.

Q. 147. What are general points of difference in regard to Succession under Sunni and Shia Law ?

Ans. General points of difference in regarding Succession : Following are general points of difference regarding succession :--

(1) Both the schools recognise the primary classification of Qur'anic sharers and residuaries. But the Sunnis use the term 'residuary' in a technical sense, while the Shias use it in the ordinary dictionary sense; thus all heirs not taking shares are residuaries according to the Shias.

(2) The Qur'anic provision that the daughter is entitled to succeed with the son, has been construed by the Shia School as entitling all female descendants to succeed, and similarly all collaterals whether male or female, whether a full-blood or a half blood, rank with the customary heirs in their own line. So a general principle has been evolved and the right of all females, however, remote, have been equalised with those of the daughters and the sisters, *e.g.*, the niece succeeds under the Shia Law and a uterine sister's daughter is also entitled to her share in the estate in competition with a full brother. Under the Sunni Law, the sister is entitled to inheritance when she comes into with a customary heir who is nearer than herself, but a niece has no claim to any right except in default of all male agnates.

(3) The most important Islamic reform is as regards the right of women. The Sunnis have construed the texts, relating to the rights strictly and with due regard to the pre-Islamic customs and without effecting any alteration regarding the nearness of kinship, with the result that only those women, *i.e.*, female agnates compete with the customary heir who are disabled owing to their sex.

On the contrary, the Shias have totally removed the basic distinction between agnates and cognates, as not only women, but relations through them have been placed on equality with the customary heir. This lenient interpretation has thus shuffled the agnates and cognates together and the proximity is reckoned merely by counting the connecting links, whether male or female.

(4) The Sunnis construe the provision about the relative proximity of parents and children and about their joint succession literally, on account of which any ascendant, howhighsoever, shares in the estate with any descendant howlowsoever. The Shia principle that the parents and descendants succeed together has been extended to ancestors collaterals. This slight verbal interpretation has resulted in far-reaching consequence.

(5) The rule that a male shall have as much as the share of two females, has been referred to by the Shias as changing the entire principle of distribution prevailing in the pre-Islamic times and they adopted the division *per stripes* instead of *per capita*. The case of uterine relations is an exception to this rule as the males and females of that class share alike.

(6) The Sunnis apply the principle of nearer in degree

excluding the more remote only to the agnatic heirs, but the Shias apply it to all classes without distinction of sex.

(7) The provision as to the one-third share of the mother when the father is living, has been used by the Sunnis in order to preserve the proportion between her share and that of the father, but the Shias have given her one-third of the whole estate so under the Shia Law her share remains undiminished.

(8) The doctrine of increase extends to all shares alike in the Sunni Law, while under the Shia Law it works only against daughter and sister.

(9) Under the Sunni Law both the husband and the wife can take by return but according to the Shias only the husband is capable of taking by return, but the wife cannot.

(10) The Sunnis do not recognise any right of primogeniture; the Shias recognise it to some extent by what is known as Habua.

Q. 148. A Muslim dies leaving a full paternal-uncle's son and a mother's father. How will the property of the deceased be distributed according to (*i*) Hanafi Law ;-(*ii*) Shia Law ?

Ans. (*i*) According to Hanafi Law : Full paternal-uncle's son is a residuary and mother's father is a distant kindred. Therefore full paternal-uncle's son will take the whole of the property as a residuary excluding mother's father who is a distant kindred.

(*ii*) According to Shia Law : Mother's father is an heir of the second class and full paternal-uncle's son is a heir of the third class. As each class excludes the class next to it, mother's father who belongs to the second class will take the whole of the property excluding full-paternal uncle's son who is an heir of the third class.

The position of heirs has undergone complete reversal in the case when we come from Hanafi to Shia Law. The reason is this that Shia Law does not recognize any separate class of distant kindreds. All heirs who are not sharers are residuaries. *Secondly* in Shia Law a classification of heirs is there which is not found in Hanafi Law. There are three classes of heirs and each class excludes the class coming after it

Q. 149. Discuss and distribute the property of a Sunni Muslim who dies leaving the following relations : (*a*) Wife ; (*b*) Uterine brother : (*c*) Uterine sister ; (*d*) Mother.

Ans. Distribution of property of Sunni deceased : In this case the deceased has left no child or son's child. Wife's share is 1/4 and the share of mother, uterine brother or uterine sister 1/6 each. Thus the shares will be as under :

Wife	...	...	1/4
Uterine brother	...	...	1/6
Uterine sister	...	...	1/6
Mother	...	...	1/6

All these shares added come to 9/12 leaving 3/2 or 1/4 behind. Now the sum of all the shares is less than unity and there are only sharers and no residuary hence by the doctrine of return the residue will revert to the sharers in proportion to their shares. Wife is not entitled to the return. Hence after deducting 1/4 the share of the wife the remaining 3/4 will be divided equally amongst the remaining three heirs. Thus each will get 1/4.

Q. 150. A Shia Muslim dies leaving a mother, a daughter and a brother. Discuss and allot the share of each. Would there be any increase ? If so, to whom will it go ?

Ans. Allotment of share of Shia Muslim amongst his relatives : As the deceased has left a mother and daughter, who belong to the first class of heirs under the Shia Law, the brother is not entitled to any share as he belongs to the second class. The allotment will be as under :--

Mother 1/6 because there is daughter of the deceased.

Daughter 1/2 3/6

Total 2/3

The total of the shares inherited by both the heirs falls short of unity. The doctrine of return will apply. The mother is not excluded from "return" because there is only one brother and one daughter. The share of the mother will be increased to 1/4 and that of the daughter to 3/4.

Q. 151. Whether under Islamic Law of Inheritance the sharers have any preference over the residuaries ?

Ans. Preference over residuaries : Yes, the sharers have a preference over the residuaries. Sharers have fixed and defined shares which they inherit if they are not excluded by some rule of inheritance. Residuaries have no fixed and defined share and inherit only when some residue is left out after satisfying the shares of the Qur'anic sharers. The Holy Qur'an has specified the amount of share of each sharer.

For example take this case. There are four heirs, husband-mother, son and a daughter. Their shares are

Husband 1/4 as share ;

Mother = $\frac{1}{6}$ as sharer ;

Son = $\frac{2}{3}$ of $\frac{7}{12}$ = $\frac{7}{18}$

as residuaries.

Daughter = $\frac{1}{3}$ of $\frac{7}{12}$ = $\frac{7}{36}$

Here, in this case, the husband and the mother are sharers. They inherit prescribed share. So first of all, they are allotted their prescribed share of $\frac{1}{4}$ and $\frac{1}{6}$ each. The residue left out after satisfying their claims is $\frac{7}{12}$ of the net estate. This residue is divided between the two residuaries, the son and the daughter of the deceased, giving double share to the son and single share to the daughter.

Q. 152. A Sunni Muslim, dies leaving his father's mother, mother's mother, a full sister and a consanguine sister,. Discuss and allot the share of each and the disposal of increase, if any.

Ans. Allotment of share of a Sunni deceased Muslim amongst his relatives : The deceased having left no father and mother, the father's mother and mother's mother are entitled to equal shares They do not exclude each other. Again, when there is only one full sister, the consanguine sister is also not excluded. Hence the following will be the share of each :--

Father's mother	1/6 (each taking 1/12)
Mother's mother	
Full sister	1/2 = 3/6
Consanguine sister	1/6.
Total	5/6.

But as the unity is not still exhausted the residue will return to these sharers in proportion to their shares. The share of the grand-mother will be increased to 1/5 each taking 1/10. The full sister will take 3/5 and the consanguine sister take 1/5 by return.

Q. 153. A, a Sunni Muslim dies leaving behind him a widow, a uterine brother, a uterine sister and a mother. Allot the shares of each of the survivor in the property of the deceased.

Ans. Allotment of shares in the property left by a Sunni Muslim to his surviving heirs : Widow will take 1/4, as there is no child or child of a son howlowsoever.

Uterine brother and uterine sister together will take 1/3 as sharers as there is no child, child of a son howlowsoever, father, or true grand-father so that each gets equally, *i.e.*, 1/6. Mother will take 1/6, as sharer, as there is a uterine brother and sister. Thus it comes to 3/4 leaving 1/4 behind it. Thus the doctrine of Return will apply. Wife is not entitled to any benefit under the doctrine of Return. Thus the balance of 1/4th will be divided equally by the other three heirs. Thus 1/4 x 1/3 = 12. Added to it 1/6th which each of the three heirs except widow get as sharer, their shares come to 1/6 + 1/12 = 1/4th.

Thus each of the heirs gets 1/4th of the property left by the deceased.

Q. 154. A dies leaving a father and a grandson (son had predeceased). Divide his movable and immovable property according to Sunni and Shia Schools.

Ans. Division of movable and immovable property amongst heirs according to Sunni and Shia Schools : As regards the question of movable or immovable property is concerned it may be noted that there is no distinction whatsoever in Islamic Law. The property both movable and immovable is to be governed by the same rules.

Under Sunni Law the widow and the father are sharers and grandson, *i.e.*, the son's son is a residuary. As a residuary by will inherit the residue that is left after satisfying the claim of the sharers.

Since there is a child of a son, the father takes 1/6 as a sharer, also for the same reason wife takes 1/8. The residue, *i.e.*, 7/24 is taken by the son's son.

According to Shia Law widow is an heir by marriage and is never excluded from an inheritance and as sharer she takes 1/8 because there is lineal descendant, a son's son. Also for the same reason father as a sharer 1/6. The residue that is left is taken by the son.

The shares of each are therefore same in Sunni and in Shia Schools, *viz.*

Widow	1/8	as sharer.
Father	1/6	as sharer.
Son's son	1--(1/8+1/6) = 7/24	as residuary

Q. 155. *A* **dies leaving (1) Father, (2) daughter, (3) mother, (4) two full brothers. Distribute** *A*'s **property among his heirs specifying the share of each according to the Hanafi and Shia law.**

Ans. Specification of shares in the property left by 'A according to Hanafi and Shia Law : The shares of each of th relations both under the Hanafi and Shia Law will be as under :--

Father takes.	1/6 as sharer.
Mother takes.	1/8 as sharer.
Daughter takes.	1/2 as sharer.
Full brothers take.	1/6 as residuaries.

Q. 156. What are the shares of the heirs, among the surviving relations in the following cases :

(*a*) Daughter, son's daughter, full sister ;

(*b*) Wife, father, mother, daughter according to--

(*i*) Hanafi Law, and

(*ii*) Shia Law ?

Ans. (*a*) Under Hanafi law the heirs of the deceased will get their share out of the deceased's estate in the following proportion :--

$$\text{Daughter} = \frac{1}{2} = \frac{3}{6}$$

$$\text{Son's daughter} = \frac{1}{6}$$

$$\text{Full sister} = \frac{2}{6}$$ as residuary because there is a daughter and a son's daughter.

Under Shia Law, the heirs of the deceased will get their share out of the deceased's estate in the following proportion :--

$$\text{Daughter} = \frac{1}{2}$$

$$\text{Son's daughter} = \frac{1}{2}$$

residuary being the daughter of a residuary (son)

Full sister = excluded because she is an heir of the second class and cannot succeed when heirs of first class are present

(*b*) Under Hanafi Law, the estate of the deceased will be distributed among his heirs as under :--

$$\text{Wife} = \frac{1}{8} = \frac{3}{24}$$

Father = $\frac{1}{6}$ = $\frac{4}{24}$ sharer $\frac{1}{24}$ as residuary = $\frac{5}{24}$

Mother = $\frac{1}{6}$ = $\frac{4}{24}$

Daughter = $\frac{1}{2}$ = $\frac{12}{24}$

According to Shia Law, the estate of the deceased will be tributed among his heirs as under :

Wife = $\frac{1}{8}$ (Wife is not entitled to return) = $\frac{5}{40}$

Father = $\frac{1}{6}$ increased to $\frac{1}{5}$ X $\frac{7}{8}$ = $\frac{7}{40}$

Mother = $\frac{1}{6}$ increased to $\frac{1}{5}$ X $\frac{7}{8}$ = $\frac{7}{40}$

Daughter = $\frac{1}{2}$ = $\frac{3}{6}$ increased to $\frac{3}{5}$ = $\frac{7}{8}$ = = $\frac{21}{40}$

Q. 157. A Hanafi woman dies leaving behind her husband, her, a son and a daughter. How will you divide her property ?

Ans. Division of property left by a Hanafi female deceased er heirs : The estate of the Hanafi woman will be divided among heirs as under :

Husband = $\frac{1}{4}$ = $\frac{3}{12}$ = $\frac{9}{36}$ (because there are children).

Mother = $\frac{1}{6}$ = = $\frac{2}{12}$ = $\frac{6}{36}$ (because there are children).

Son = $\frac{2}{3}$ X $\frac{7}{12}$ (residue) = $\frac{14}{36}$ (as residuary).

Daughter = $\frac{1}{3}$ X $\frac{7}{12}$ (residue) = $\frac{7}{36}$ (as residuary).

Q. 158. A Muslim dies, leaving father's mother, a full ler and a daughter's son. How is the estate to be buted :--

(i) according to Hanafi Law ;

(*ii*) according to Shia Law ?

Ans. Distribution of estate left by a deceased Muslim amongst his heirs according to Hanafi and Shia Laws :

(*i*) The estate of the deceased will be distributed according to Hanafi Law as under :

Father's Mother = 1/6 as sharer, there being no mother.

Full Brother = 5/6 as residuary.

Daughter's son = excluded being a distant kindred.

(*ii*) The estate of the deceased will be distributed according to Shia Law as under :--

Father's Mother = excluded being an heir of the second class.

Full Brother = excluded being an heir of the second class.

Daughter's son = whole estate. He succeeds to the whole estate being an heir of the first class. There is no other nearer heir in the same class who can exclude him.

The result of the distribution of estate under Hanafi and Shia Laws is quite opposed to each other. Under Hanafi Law, daughter's son is a distant kinsman and is excluded by other nearer heirs, sharer and residuary. But under Shia Law, he takes the whole estate because he is an heir of the first class whereas father's mother and full brother, both are heirs of the second class.

Q. 159. A Muslim dies leaving a daughter's son and a full brother. How will the estate of the deceased be distributed according to Sunni Law and Shia Law ?

Ans. Distribution of estate of Muslim amongst his heirs according to Sunni and Shia Law : According to Hanafi Law a daughter's son is a distant kindred and a full brother is a residuary. A distant kindred can succeed only in the absence of all sharers and residuaries or when the only sharer is a husband or a wife. So the full brother will take the whole of the deceased's estate as a residuary, and the daughter's son will be excluded

According to Shia Law, the daughter's son is an heir belonging to the first category of heirs. He will succeed to the whole of the estate as there is no higher son or daughter. Full brother is an heir of the second category and heirs of second category can succeed only

when there is no heir of the first category. Thus, under Shia Law, he will be excluded by daugther's son, whereas, under Sunni Law he excludes the daughter's son.

Q. 160. A Muslim dies leaving wife, mother and father. How will the estate of the deceased be distributed according to : (*i*) Sunni Law. (*ii*) Shia Law ?

Ans. Distribution of estate left by a Muslim amongst his heirs according to Sunni and Shia Law : (*i*) The estate will be distributed according to Sunni Law as follows :

Wife = $\frac{1}{4}$ as sharer, there being no children.

Mother = $\frac{1}{3}$ of $\frac{3}{4}$ = $\frac{1}{4}$ as sharer, there being no children.

Father = $\frac{1}{2}$ as residuary, there being no children.

(Mother takes $\frac{1}{3}$ of the remainder after deducting the widow's share.)

(*ii*) The estate will be distributed according to Shia Law as follows :

Wife = $\frac{1}{4}$ = $\frac{3}{12}$ as sharer, there being no children.

Mother = $\frac{1}{3}$ = $\frac{4}{12}$ as sharer, there being no children.

Father = $\frac{5}{12}$ as residuary, there being no children.

The difference between Shia and Sunni Laws of Inheritance in this case arises because under Sunni Law mother is given ½ of the estate after deducting the share of the widow But under Shia Law she inherits $\frac{1}{3}$ of the whole estate of the deceased.

Q. 161. *A*, **a Muslim dies leaving** (*i*) **a daughter's daughter's son,** (*ii*) **a daughter's son's son,** (*iii*) **a daughter's son's daughter. How will you distribute the estate according to** (*i*) Shia Law, (*b*)

according to the view of Abu Yusuf of Sunni Hanafi Law, and (*c*) according to the view of Imam Mohammad of the Sunni Hanafi School ?

Ans. (*a*) (*i*) Shares according to Shia Law :

(1) Daughter's daughter's son = $\frac{1}{3}$, being the share of his mother,

(2) Daughter's son's son = $\frac{2}{3} \times \frac{2}{3} = \frac{4}{9}$,

(3) Daughter's son's daughter = $\frac{1}{3} \times \frac{2}{3} = \frac{2}{9}$

In the case of the last two heirs, they inherit the share of their father, $\frac{2}{3}$. So the son gets $\frac{2}{3} \times \frac{2}{3}$ and the daughter $\frac{1}{3} \times \frac{2}{3}$.

(*ii*) Shares according to the view of Abu Yusaf

(1) Daughter's daughter's son = $\frac{2}{5}$

(2) Daughter's son's son = $\frac{2}{5}$

(3) Daughter's son's daughter = $\frac{1}{5}$

Imam Abu Yusuf does not take notice of the sex of the intermediate ancestor, but regards only to sex of the actual claimants. Imam Muhammad takes notice of the sex of intermediate ancestors as well

(*iii*) Share according to the view of Imam Mohammad

(1) Daughter's daughter's son $\frac{1}{3}$ is the share assigned to his mothers, where sexes differ.

(2) Daughter's son's son $\frac{2}{3} \times \frac{2}{3} = \frac{4}{9}$ ($\frac{2}{3}$ is the share assigned to his father, where sexes differ).

(3) Daughter's son's daughter $\frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$ ($\frac{2}{3}$

being the share of her and her brother's father).

Q. 162. A Muslim lady dies leaving the following heirs : (*i*) Husband, (*ii*) Mother, (*iii*) Daughter, and (*iv*) Son's daughter.

How will the property be distributed according to :--

(*a*) Sunni Law ; (*b*) Shia Law ?

Ans. (*a*) Division of property according to Sunni Law

(*i*) Husband $= \frac{1}{4}$ (because there are children).

(*ii*) Mother $= \frac{1}{6}$ (because there are children).

(*iii*) Daughter $= \frac{1}{2}$ (because there is no son).

(*iv*) Son's daughter $= \frac{1}{6}$ (because there is only one daughter).

But the total of these shares exceeds unity so the doctrine of increase will be applied as follows :--

$$\frac{1}{4} + \frac{1}{6} + \frac{1}{2} + \frac{1}{6} = \frac{3+2+2+6+2}{12} = \frac{13}{12}$$

So the shares are now as follows :--

(*i*) Husband $= \frac{3}{13}$

(*ii*) Mother $= \frac{2}{13}$

(*iii*) Daughter $= \frac{6}{13}$

(*iv*) Son's Daughter $= \frac{2}{13}$

(*b*) Division of property according to Shia Law :

(*i*) Husband $= \frac{1}{4}$ (Not entitled to "return") $= \frac{4}{16}$

(*ii*) Mother = 1/6 (increased to 1/4 X 3/4 = 3/15)

(*iii*) Daughter = 1/2 3/6 increased to 1/4 X 3/4 = 9/16)

(*iv*) Son's daughter = excluded by daughter who is nearer in degree.

Muslim Family Laws Ordinance, 1961

Q. 1. What do you understand by principle of representation in Islamic Law of Inheritance ? To what extent it has been affected by the Muslim Family Laws Ordinance 1961?

Ans. Principle of representation : -- According to the Sunni Law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will. According to the Shia Law, it does pass by succession.

A, a Sunni Muslim, has two sons *B* and *C*. *B* dies in the life-time of *A*, leaving son *D*. *A* then dies leaving *C* his son and *D*, his grandson. The whole of *A's* property will pass to *C* to the entire exclusion of *D*. It is not open to *D* to contend that he is entitled to *B's* share as representing '*B*'.

In the case cited above their Lordships of the Privy Council observed: "It is a well-known principle of Islamic Law that if any of the children of a man dies before the opening of the succession to his estate, leaving children behind, these grand-children are entirely excluded from the inheritance by their uncles and their aunts". The son of a predeceased son is, therefore, not an heir.

If in the above case, *B* bequeathed any portion of his expectant share in *A's* property to *X*, the latter would take nothing under the will. "A mere possibility such as the expectant right of an heir-apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest or transfer so long as the right has not actually come into existence by the death of the present owners."

Share of inheritance in Islamic Law is due only after opening out of succession.

The changes brought out by the Ordinance in matters of inheritance is at variance with the Hanafi Law as is indicated by the following example :

A man dies leaving behind one daughter and a predeceased son's daughter. The respective shares according to Hanafi Law shall be as under :

Daughter's share	1/2
Predeceased son's daughter's share	1/6

But under the Ordinance the shares will be :

Daughter	1/3
Predeceased son's daughter	2/3.

Where a deceased Muslim was survived by six daughters and one grandson and a grand-daughter of his predeceased son, the property of deceased is to be distributed amongst heirs in accordance with the Shariat. Provisions of Section 4 of the Ordinance will not be attracted where deceased Muslim has been survived by daughters and children of his predeceased son. Son and daughter of predeceased son cannot be excluded from inheritance as deceased at the time of his death had left behind no male issue. Grandson and grand-daughter of deceased will be entitled to inherit the residue left after assigning shares of sharers.

Suit for correction of mutation was barred by Article 120, Limitation Act; 1908. The plaintiff claiming Shari share of his wife after her death. The plaintiff's wife being satisfied with the share of inheritance did not raise objection thereto. The plaintiff's suit being barred by limitation and otherwise not warranted on merits was rightly dismissed by the Courts below.

Muslim Family Laws Ordinance, 1961 is not retrospective in nature. Succession to property in question, having opened out on the demise of its owner prior to enforcement of Muslim Family Laws Ordinance, 1961, S. 4 thereof, would not apply for regulating rights of inheritance. Deceased owner having left behind three sons and one widow, they would inherit his property, his fourth son having predeceased him, children of that son would not inherit. Widow of deceased owner also having died before the enforcement of Muslim Family Laws Ordinance, her three surviving sons would inherit in equal shares while her grandson (son of predeceased son) would not inherit her share.

Predecessors of the parties, on his death left behind his widow, daughter and a daughter of his predeceased son. Wife and daughter of deceased being entitled to 1/8th share and 7/24th shares respectively were rightly given those shares by the Courts below. Predeceased son's daughter, however, claimed remaining 14/24th shares to which her father would have been entitled if alive at the time of death of deceased predecessor. Grand-child was not entitled to more share than what could be inherited from the parents. Predeceased son's daughter could claim only 1/2 share of the property to which her father would have been entitled if alive at the time of death of her grand-father. The trial Courts had thus, rightly decreed her suit to the extent of 7/24th share. Remaining 7/24th shares of predeceased son were to be distributed amongst his other Shari heirs. Predeceased son's mother was to receive 1/6th share out of the same, which would be 7/14th share in the entire property, while his sister would get the residue, *i.e.*, 35/144th in the entire property in addition to the property inherited by them as Shari heirs of deceased predecessor. The petition for leave to appeal was converted into appeal directing. Revenue Record to be corrected regarding the

entire property left by the deceased predecessor, whether the same was included in the present litigation or not. **1992 S C M R 935.**

Female child of a predeceased father was entitled to inherit his entire share, which he would have inherited if alive, and not a share to which she was entitled to, under the Islamic Law.

The plaintiff being son of a predeceased daughter of propositus and inherited him under Section 4, Muslim Family Laws Ordinance, 1961, as such was co-sharer in land in suit. Possession of one co-sharer enured for the benefit of other co-sharers also, unless there was ouster. Mere fact of entry in mutation of revenue records having been made adverse to the plaintiff who has been found to be in possession of at least some of suit land, could not render suit of the plaintiff time-barred. Suit for declaration that mutation of land effected in favour of the defendants was null and void as against the plaintiff, was therefore, not defective and was maintainable in circumstances. **1985 CLC 2268**.

Grand-daughter's entitlement to inherit the property of their grand-father in the event of death of their mother before opening of succession. Predeceased daughter's daughters were entitled to the share which their mother would have received if she had survived on the death of propositus, *viz*., her father.

Exclusion from inheritance : The claims of inheritance under the North-West Frontier Province Muslim Personal Law (Shariat) Application Act, 1935, were like all other claims subject to the provisions of the Limitation Act 1908. The plaintiff and the defendants had not been excluded from inheritance of properties. Had such heirs been excluded from inheritance they could not claim their share when barred by the Law of Limitation.

Right of inheritance of child of predeceased son before promulgation of Muslim Family Laws Ordinance, 1961 : Ownership of land in question claimed on basis of two successive decrees of Court. Decree prior in time was valid on the ground that transaction in question was accepted correct by vendors thereof and subsequently mutations were also got attested on basis thereof, on specified date. Subsequent suit culminating into decree was instituted after the decree had been obtained by prior vendee and decree in that suit was also granted subsequently in time. Subsequent decree, however was obtained by rival claimant not on ground of purchase but on ground of being owner through inheritance from his father while in fact his father had predeceased his grand-father, the latter having died in 1952 and his inheritance mutation had been attested in 1952. Suit of rival claimant could not have been instituted on another ground for he had no cause of predeceased son could not inherit from grand-father in 1962 because such right was given to a grand-child in the year 1961 through Section 4, Muslim Family Laws Ordinance, 1961, which

was not given retrospective effect. Decree granted in favour of rival claimant in which prior vendee had not been impleaded and which was subsequent in point of time was declared to be ineffective against the rights of prior vendee.

No retrospective effect : The Ordinance came into force on 15th July, 1961, and it has no retrospective effect. A question may arise whether Section 4 would apply to son or daughter, whose death occurred before 15th July, 1961. The answer, depends on the interpretation of the words "in the event of the death." These words do not refer to past events. The words "in the event of" refer only to the death of the son or daughter of the propositus occurring before the succession opens. These words would bring within their compass sons and daughters dying before as well as after the Ordinance came into force. The only condition is that the death should occur before the succession has opened. If succession opens after promulgation of the Ordinance Section 4 would apply with full force.

Entitlement to inherit on death of propostitute, viz., grand-father : The contention that predeceased son having died in 1950. Family Laws Ordinance promulgated in 1961, could not by virtue of Section 4 thereof, be assistance to his children. Leave to appeal granted to examine the questions whether the property, being evacuee, petitioners would not be entitled to the relief claimed, by virtue of para 46 of the Rehabilitation Scheme and whether the Family Laws Ordinance, 1961 read with other connected laws would not be given such effect so as to entitle petitioners to inherit the estate left by their grand father, question of retrospectivity of Ordinance, 1961 would also need re-examination.

Right of pre-emption : Court has only to keep in view pre-emptor and vendee and no other relation of vendor while determining superiority of right of pre-emption. Court would take it that vendor had died and to find out as to who of the parties of suit was entitled to inherit his property to exclusion of the other. Person so entitled would have superior right of pre-emption. Where such person was pre-emptor he would get a decree and if he was a vendee, pre-emptor's suit would be dismissed. Where the parties to suit of pre-emption were entitled to inherit equally, right to pre-empt, was to be declared equal and pre-emptor's suit would fail.

Q. 2. What restrictions have been imposed on a Muslim male for contracting another marriage during the presence of an existing marriage under the Muslim Family Laws Ordinance, 1961 ?

Or

How polygamy has been regulated by Muslim Family Laws Ordinance, 1961 ?

Ans. Restrictions imposed on another marriage : Section 6,

Muslim Family Laws Ordinance, 1961 has imposed restrictions on Muslim male for contracting another marriage during the presence of an existing marriage to the following extent :--

(1) No man, during the subsistence of an existing marriage shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under sub-section (1) shall be submitted to the chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage and whether the consent of the existing wife or wives have been obtained thereto.

(3) On receipt of the application under sub-section (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any as may be deemed fit, the permission applied for.

(4) In deciding the application, the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period and on payment of the prescribed fee, prefer an application for revision (to the Collector) concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall--

(*a*) pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount if not so paid, shall be recoverable as arrears of land revenue, and

(*b*) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

Ban on polygamy : Section 6 imposes a ban on polygamy. But the prohibition is not absolute, because it does not say that no man shall have a right to marry another woman under any circumstances when he has already a wife (or wives) living. For the exercise of the right of polygamy, the Ordinance insists upon the fulfilment of certain conditions which shall have to be complied with

before a man is permitted to take a wife during the life-time of his previously married wife. This has necessitated the intervention of the Arbitration Council which shall be the sole judge (subject to a revision to the Revisional Authority) as to whether circumstances are such, having regard to the provisions laid down in the Ordinance and the Rules, that it makes necessary for the man to contract a fresh marriage.

The section, therefore, enacts that when a man wants to contract another marriage having already a wife or wives living he cannot do so without the previous permission of the Arbitration Council. Sub-section (1) further says that any such marriage contracted without such permission shall not be registered under this Ordinance.

The Courts in Balochistan has no jurisdiction to initiate proceedings on accusation of polygamy unless complaint was made by concerned Union Committee. Complaint filed by private complainant was not maintainable.

A woman contracted marriage with a person already married. The woman who is married by the husband without permission during the existence of other wife is liable for any offence and nowhere the said Ordinance casts any such duty upon the woman who is married by a man already married either to apply for permission to marry or to suffer any imprisonment for the fault of her husband's taking her as a wife during the continuance of her husband's existing marriage without permission nor she was obliged to undergo the punishment as an abetter. The proceeding against the second wife, drawn under Section 6(5) of the Ordinance is thus unwarranted. The Court initiated proceeding against the second wife by taking a wrong view of the law.

Failure to obtain permission under Section 6 of Muslim Family Laws Ordinance, 1961 only attracted penal action, but does not affect the validity of the second marriage.

Husband during the subsistence of first marriage, solemnizing another marriage without obtaining the permission of the Arbitration Council, was complained by second wife. Leave to appeal was granted to husband to examine whether second wife "had no *locus standi*" to file a complaint for the alleged offence by the husband of polygamy as she was not an aggrieved person within the meaning of Section 6 because the said provision was intended for the protection of the rights of the first wife rather than those of the subsequent wife.

Polygamy is prohibited under Section 6 of the Muslim Family Laws Ordinance, 1961 and violation of such prohibition carries punishment of imprisonment up to one year.

Polygamy not prohibited altogether : The provisions of the Muslim Family Laws Ordinance did not prohibit polygamy altogether but allowed it under certain conditions. A man can take second wife,

in spite of the fact that he has other wife or wives living provided that he took previous permission from the Arbitration Council in writing in which the application he should state the reason for doing so and also should mention whether he has obtained the consent of his existing wife or wives in this regard Procedure which must be already followed when a husband having a wife, wants to contract a fresh marriage. Obtaining prior permission before the contracting another marriage by a man during the continuance of his existing marriage or marriages is made obligatory under the Ordinance and it is allowed by a punishment for violation of the same. Under sub-section (5) of Section 6 of the Ordinance criminal liability will thus be incurred by the husband being the 'man' referred to in that sub-section and not by the woman whom he marries.

Scope of Ordinance : The Ordinance only penalizes the person in respect of a marriage celebrated in contravention of the provisions of the Ordinance by making him liable to imprisonment or fine or both but does not invalidate the marriage itself.

Object of section : Section 6 is aimed at restricting polygamy.

Provisions of Section 6 mandatory : Person contracting second marriage in violation of Section 6 (5) (a) and rules would be liable to be visited by a penalty to the effect that entire amount of dower shall become immediately payable and to be recovered as arrears of land revenue.

Contravention of Section 6 : Contracting a marriage in contravention of Section 6, Muslim Family Laws Ordinance, 1961 was not only an offence, but also gave rise to certain civil consequences in favour of existing wife or wives, as the case may be.

Essential ingredients : Necessary constituents of an offence under Section 6(5) of the Ordinance were (*i*) a previous marriage and an existing wife/wives, (*ii*) absence of a requisite permission from Arbitration Council for taking additional wife and (*iii*) celebration of marriage in violation of Section 6 of the Ordinance.

Permission to contract second marriage : In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage. The Arbitration Council may, without prejudice to its general powers to consider what is just and necessary, have regard to such circumstances as the following amongst others : –

Sterility, physical infirmity, physical unfitness for the conjugal relations, wilful avoidance of a decree for restitution of conjugal rights or insanity on the part of an existing wife. (*Rule 14*).

An application under sub-section (1) of Section 6 for permission to contract another marriage during the subsistence of an existing marriage shall be in writing shall state whether the consent of

the existing wife or wives have been obtained thereto, shall contain a brief statement of the grounds on which the new marriage is alleged to be just and necessary shall bear the signature of the applicant and shall be accompanied by a fee of one hundred rupee.

Second marriage, validity of : Where a person while contracting second marriage had not obtained requisite permission, such marriage could be vested with penal consequences contained in the Ordinance. Failure to obtain permission from first wife or Arbitration Council would not invalidate the second marriage.

Contracting second marriage without permission from first wife--Punishment for : The accused contracting second marriage during the subsistence of existing marriage without the permission of first wife was convicted to one year simple imprisonment and a fine of Rs. 2,000. The Appellate Court reduced sentence of imprisonment to already undergone and fine from two thousand to one thousand. The revision by first wife was filed against reduction of sentence. The contention that the accused having undergone only four days' simple imprisonment his sentence should not have been reduced. Case being old one and accused who stood convicted had undergone some period of imprisonment as well. High Court in exercise of revisional jurisdiction in the interest of justice refused to award sentence of imprisonment to the accused at that stage.

Second marriage by husband -- Consent of wife : Wife denying, having given consent for permission of husband for second marriage, who had already applied in the Arbitration Council. Record showing report of the Handwriting Expert categorically giving a finding that signatures of wife did not tally with her signature on the alleged consent application. Husband did not question the wisdom of the Handwriting Expert either by availing of opportunity of cross-examining him before the Collector or to rebut the same by leading evidence to the contrary. The Chairman Arbitration Council also did not compare the two signatures on her own. Evidence of the Handwriting Expert having gone unrebutted and un-challenged was proved and the consent was not the consent of wife as contemplated by law in circumstances.

"Aggrieved" used in Section 6--Connotation : Husband during the subsistence of first marriage solemnized another marriage without obtaining the permission of the Arbitration Council. Any person in addition to the first wife, can make a grievance petition.

Q. 3. What is Arbitration Council under the Muslim Family Law, 1961 ? What are its functions under the above law ?

Ans. Arbitration Council : "Arbitration Council" means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with in this Ordinance :

Provided that where any party fails to nominate a

representative within the prescribed time, the body formed without such representative shall be the Arbitration Council.

Arbitration Council shall consist of a Chairman and a representative of each of the parties for the purpose of dealing with a matter under the Ordinance. The total number of members in an Arbitration Council may be three but it may be even more, as when a person has more than one wife, each of the wife shall have a right to nominate her individual representative in the Council.

The proviso to clause (*a*) of Section 2 provides that the failure of a party to nominate its own representative will not affect the validity of the Arbitration Council's proceedings without such representative shall have the same binding effect as if it were a fully representative body.

The regulation of the proceedings before the Arbitration Council shall be as laid down in rules 5 and 6 of the Rules. They are as follows :

(1) The Chairman shall conduct the proceedings as expeditiously as possible.

(2) Such proceedings shall not be vitiated by reason of a vacancy in the Arbitration Council whether on account of failure of any person to nominate a representative or otherwise.

Similar provision has also been provided in the Ordinance itself by addition of a proviso to clause (*a*) of Section 2 *vide* Ordinance XXI of 1961).

(3) Where vacancy arises otherwise than through failure to make a nomination, the Chairman shall require a fresh nomination. Thus, if the person nominated dies, is otherwise rendered unfit to act as a party representative, the Chairman shall ask such party to make a fresh nomination sub-rule (4) of Rule 5 Muslim Family Laws Rules, 1965, framed under Muslim Family Laws Ordinance, 1961, should also be read with rule 6(2) which provides when a party is entitled to revoke the nomination of its representative.

(4) No party to a proceeding shall be member of the Arbitration Council. In other words, a party shall not be entitled to nominate itself as that party's representative in a Council. If the Chairman himself is a party to the proceedings, he shall be debarred to act as such or to be a member of the Council. This is also prohibited by the proviso to clause (6) of Section 2.

All decisions of the Arbitration Council shall be taken by majority, and when no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration Council.

Jurisdiction of Arbitration Council : Objection to territorial jurisdiction of the Arbitration Council neither raised before the Arbitration Council nor before the Revisional Authority could not be raised for the first time before the High Court in constitutional jurisdiction.

Petitioner alleging that he had not been given adequate opportunity of being heard. Record of the Arbitration Council and order passed by the Chairman showed that the petitioner was allowed sufficient opportunity in that behalf. Parties were called upon to appoint their representatives and they were appointed accordingly. Arbitration Council and order passed by the Chairman showed that the petitioner was allowed sufficient opportunity in that behalf. Parties were called upon to appoint their representatives and they were appointed accordingly. Arbitration Council after holding proceedings adjourned matter, but on adjourned date of hearing neither petitioner nor his representative appeared. Representative of petitioner sent a letter, after more than one month stating therein that the petitioner intended to proceed for Haj, therefore, some other date after Haj be fixed. Petitioner actually had not proceeded to Haj at the time when *ex parte* order was passed against him. No justification was given by the petitioner for not appearing before the Arbitration Council on the date fixed. Representative of petitioner failed to explain as to why he did not appear on the adjourned date of hearing. It could not be said that no opportunity was allowed to petitioner of being heard in circumstances.

Q. 4. How a Talak becomes effective under the Muslim Family Laws Ordinance of 1961 ?

Ans. Talak under the Muslim Family Laws Ordinance, 1961 : Under the Muslim Family Laws Ordinance, 1961 a man who wishes to divorce his wife has to give to the Chairman of his Union Council/Committee a notice in writing as soon as may be after the pronouncement of talak in any form. A copy of the notice has to be given to the wife.

Chairman constitutes an Arbitration Council within thirty days of the receipt of the notice. This Arbitration Council takes all steps necessary to bring about reconciliation between the husband and wife

If the Arbitration Council fails in its efforts, and the talak is not revoked, it becomes effective after the expiration of ninety days from the day on which notice was delivered to the Chairman. If the wife be pregnant at the time talak is pronounced, talak does not become effective until the above-mentioned ninety days of the pregnancy, whichever be later, ends.

So, under the Family Laws Ordinance, a single method of giving talak has been substituted for three methods. Three

pronouncements at a single time do not dissolve the marriage tie at once. Talak in any form becomes effective only after the passage of ninety days after the giving of notice of talak to the Chairman. If the wife is pregnant, then it terminates with the termination of pregnancy if it terminates after 90 days.

The same procedure has been provided for the exercise of talak-ut-tafweez and it also becomes effective after ninety days. In other methods of dissolving the marriage, the same procedure is to be followed *mutatis mutandis*, and the marriage is dissolved after 90 days.

Q. 5. A Pakistani Muslim wants to marry a second wife during the subsistence of his existing marriage. What procedure should be adopted under the Muslim Family Laws Ordinance, 1961 for such marriage?

Ans. Procedure to be adopted by a Muslim for contracting second marriage in existence of first wife : The person who wants to contract a second marriage during the subsistence of his first marriage should submit an application for the permission of the Arbitration Council to the Chairman of his Union Committee/Council in the prescribed manner together with the prescribed fee. In this application he has to state the reasons for the proposed marriage, and also whether the consent of the existing wife or wives to the proposed marriage has been obtained.

On receipt of this application, the Chairman has to ask the applicant and his existing wife or wives each to nominate one representative for the Arbitration Council. The Chairman of the Union Committee becomes its Chairman as well. This Arbitration Council can grant permission for a new marriage during the subsistence of an existing marriage, if it is satisfied that the proposed marriage is necessary and just. It may impose such conditions as it thinks fit with the permission granted.

Q. 6. What changes have been brought about by the Muslim Family Laws Ordinance, 1961 regarding the age of the child for purpose of marriage under Islamic Law ?

Ans. Age of child for purpose of marriage : Under Sec. 2 (*a*), the Child Marriage Restraint Act, 1929 the age of the girl for the purpose of marriage was stipulated as 14 years and the age of the boy was required to be 16 years. But this has undergone change and amendment through the medium of the Muslim Family Laws Ordinance, 1961. The age according to this Act has been raised in case of girl by 2 years. Now girl should have attained the age of 16 years before she is married.

Q. 7. What useful purpose or legal benefit has been secured for the Muslim Public by a provision of compulsory registration of marriage ?

Ans. Compulsory registration of Muslim marriages : Section 5 of the Muslim Family Laws Ordinance, 1961 provides : "Every marriage solemnised under Muslim Law shall be registered in accordance with the provisions of the Ordinance". The Union Council is authorised to grant licences to one or more persons to be called "Nikah Registrar". Every marriage not solemnized by the Nikah Registrar shall for the purposes of the registration under this Ordinance be reported to him by the person who has solemnized such marriage. Whoever contravenes the above provisions shall be punishable with simple imprisonment for a term which may extend to one thousand rupees or with fine or with both. Due to this registration the enquiry about the woman or the person whether already married is easily possible because Section 5, clause 6 of the Ordinance provides that any person may on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved. The record is kept at two places, *i.e.*, in the Union Council as well as in the register of Nikah Registrar. Therefore, the chances of tampering with the record are rare. This registration of marriage is a great check for contracting any second marriage. Moreover, the dower money is specified in the record which can also be conferred on the payment of fee charged by the Nikah Registrar.

Q. 8. Define the terms Pronouncement and Revocation of Talaq.

Ans "Pronouncement" and "revocation" of talaq : According to the case of *Rashida v. Ghulam Raza*, howsoever short the time lag between the two acts of pronouncement and sending the notice may be yet the intention of the law-makers was that the "pronouncement" of the talaq must be conscious and independent act. The term "pronouncement" has not been defined in the Ordinance, therefore, the ordinary Islamic Law on pronouncement of a divorce shall continue to apply notwithstanding the provisions of the Muslim Family Laws Ordinance. For example, if a wife denies or disproves the two essential requirements one, pronouncement of talaq and two the receipt of the copy of the notice by her; then notwithstanding the fact that the husband is able to prove the third requirement namely, that he gave the Chairman "a notice in writing of his having done so" (*i.e.*, pronounced the talaq), the mandatory provisions of sub-section (1) of Section 7 would not be deemed to have been complied with. Similarly, the word "revocation" has not been defined in the Ordinance nor any procedure has been prescribed as to how the talaq could be revoked. Applying the same reasoning *qua* the pronouncement of talaq to "revocation" thereof, it is held that general Islamic Law would govern all aspects of revocation. **PLD 1977 Lah. 363 ; PLJ 1977 Lah. 69.**

Q. 9. A, a Pakistani Muslim who is on a short visit to London, takes an English woman as his additional wife. Will the

provisions of the Muslim Family Laws Ordinance, 1961 apply to this case ?

Ans. Application of the provisions of Muslim Family Laws Ordinance, 1961 : Muslim Family Laws Ordinance, 1961 is applicable to all Pakistani Muslims wherever they are. It is a piece of substantive law and determines the capacity of a Pakistani Muslim in the field of marriage. So if a Pakistani Muslim takes an additional wife in England while on short visit to that country, he is liable to the penalty provided in the Muslim Family Laws Ordinance for taking an additional wife without proper permission. He is liable to pay all the dower, prompt or deferred to his existing wife or wives and may also be sentenced to a term of simple imprisonment which may extend to one year with or without fine or with only a fine extending to five thousand rupees.

Q. 10. What are the duties of Nikah Registrar in the registration of marriage ?

Ans. Duties of Nikah Registrar : In the case of *Shah Din* v. *State*, it was held that the duty of Nikah Registrar is not simply filling of various columns of Nikahnama in routine but realise that duty they were required to perform is very sacred because rights to succession, maintenance, dower, divorce, legitimacy of children and several other rights flow from valid marriage. The sense of responsibility has to be demonstrated by Nikah Registrar before authenticating Nikah by making proper enquiries as to competency of parties to understand nature of their acts, their ages, and whether or not they are acting of their free will and without any compulsion.

In our society, the girl is normally given in marriage by her parents and in their absence by the nearest blood relation and that too mostly at her ordinary place of residence. If this solemn ceremony is performed by the persons not answering the above description and at a place other than the ordinary place of residence of the girl in closed doors under mysterious circumstances a heavy duty is cast on the Nikah Registrars to thoroughly confirm and probe into the circumstances under which the marriage was being solemnised before authenticating the same. If Registrar fails, he can, to a great extent, be held responsible for the complications that follow in addition to running the risk of being involved in litigation, both civil and criminal. **P L D 1984 Lah. 137.**

SHARIAT ACT, 1937

Q. 11. Write a short note on the Muslim Personal Law (Shariat) Application Act, 1937.

Ans. Muslim Personal Law (Shariat) Application Act, 1937 : For several years past it has been the cherished desire of the Muslims of the country that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the

press as well as on the platform. The Muslim religious parties of the country has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so called Customary Law is simply disgraceful. As the Muslim Women Organisations have, therefore, condemned the Customary Law, as it adversely affects their rights, they demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this the present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) in the form of a varitable code and is too well-known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

Q. 12. What changes were introduced in the Law applicable to Muslim by the Shariat Act, 1937 ?

Ans. Law before the Shariat Act, 1937 : The section makes no reference to custom and in an old Allahabad case it was construed as excluding evidence of custom. But since the decision of the Privy Council referred to in the last paragraph it was construed as subject to proof of family custom in supersession of the Islamic Law. The custom must be ancient and reasonable and the burden of proof lies upon the party who sets up the custom. It may be proved by instances or by the Wajib-ul-Arz or Riwaz-i-Am but cannot be enlarged by parity of reasoning. As to the evidentiary value of a Wajib-ul-Arz. or Riwaz-i-Am. following cases are of great help.

Principle of justice. equity and good conscience are the hallmarks. of this Act.

Lord Hobhouse has ruled this : --

'In point of fact. the matter must be decided by equity and good conscience. generally interpreted to mean the rules of English Law if found applicable to Local society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power. nor do they see why it should be so in Country. In the case of a Muslim Lady s transfer for consideration with a partial restraint was valid though not in exclusive reliance upon English Law. On the other hand the Islamic Law is applied in cases of pre-emption as the rule of justice. equity and good conscience. Again in cases of gifts in State where the Legislature has not expressly applied the Islamic Law to gifts that law has been resorted to as regards gifts made by Muslims

both before, and after the transfer of Property Act took effect. This application of Islamic Law can only be put on the ground of justice, equity and good conscience though at one time a contrary opinion was entertained by individual judges.

Law after the Shariat Act, 1937 : The Shariat Act 1937 which invalidates customs in derogation of the Islamic Law had by Section 6 (3) repealed this section so far as it was inconsistent with its provisions. The section makes no reference to custom but it had been construed by the Privy Council as subject to proof of family custom at variance with the Islamic Law. This construction of the section is no longer admissible except as to customs (*e.g.*, affecting agricultural land) to which the act does not apply.

The provisions of this section of the Regulation have been repealed so far as inconsistent with that Act by the Shariat Act, 1937. Evidence of usage of the country is therefore inadmissible to prove a custom contrary to the Islamic Law, unless in respect of agricultural land or other matter outside the Act.

Before the Shariat Act it was held that though usage is mentioned in the Regulation before the law of the defendant there is no presumption in favour of custom. It must be proved that the matter is governed by custom and not by personal law. Evidence may be given under this section of a custom excluding women from any share in the inheritance of a paternal relation. The High Court of Bombay gave effect to a usage prevailing in the State of performing rites and ceremonies at the graves of deceased Muslims and granted an injunction at the suit of the Muslims residents of Dharwar restraining the purchaser of a graveyard from obstructing them in performing religious ceremonies at the graveyard.

The Shariat Act repeals Section 5 of the Punjab Laws Act, 1872, in so far as it is inconsistent with its provisions. Evidence of custom contrary to the Islamic Law is therefore not admissible on question of succession, special property of females, marriage, divorce, dower, adoption, guardianship and gifts. As to agricultural land the law remains as declared in the Punjab Act. In the matter of wills and legacies a Muslim is given by Section 3 of the Shariat Act the option of remaining under the customary law or of adopting the Islamic Law. The Shariat Act is not retrospective.

Before the Shariat Act evidence was admissible to prove a custom contrary to the Islamic Law. This will appear from the four following paragraphs.

Abrogation of custom : The abrogation of custom in favour of Islamic Law may be inferred from a continuous course of conduct. But an individual cannot by a mere declaration abolish a long established custom.

SHARIAT APPLICATION ACT, 1962

Q. 13. Briefly discuss 'the importance of Muslim Personal Law (Shariat) Application Act, 1962.

Ans. Muslim Family Laws Ordinance, 1961 has been enacted to cater the needs of grand-children and to remove their suffering but it cannot be interpreted so as to decrease the shares of the other descendants. Section 4 of the Muslim Family Laws Ordinance, 1961 in spite of non-obstante clause, has to be interpreted in the light of Section 2, Muslim Personal Law (Shariat) Application Act, 1962 and both the statutes can stand together.

The relevant provisions of Act, V of 1962 and the Ordinance, VII of 1961 have to be read together and rule of interpretation for harmonising statutory provision is to be applied. Last male owner died in 1947. Life estate of widow of deceased terminating in 1962. The persons entitled to inherit on termination of life estate of widow by operation of law *vide* Section 3, Muslim Personal Law (Shariat) Application Act, 1962. On death of last male owner his sister and widow were alive, while his brother and his daughter had pre-deceased him. Claimants for inheritance were the appellant, *i.e.*, son of pre-deceased brother and children of pre-deceased daughter. While enforcing Section 5, Muslim Personal Law (Shariat) Application Act, 1962, for the purpose of devolution of estate of last full owner the Muslim Family Laws Ordinance, 1961 had to be applied. Section 4 Muslim Family Laws Ordinance, 1961, allows inheritance to children of pre-deceased son or daughter to the extent that the son or daughter would have got On termination of life estate, children of pre-deceased daughter of last full owner, would inherit the share which their mother would have got as if she were alive at the time of opening of succession, *i.e.*, on the demise of last full owner. Last full owner would thus, be succeeded by his heirs, the widow, sister and predeceased daughter's children. The appellant the pre-deceased brother's son would not inherit. Distribution of shares amongst heirs, assigned by the High Court having not been assailed in appeal, no interference therein was called for.

Suits for the annulment of alienation based on customary law, at whatever stage, stood abated on the enforcement of the Ordinance, XIII of 1983. If certain conditions were fulfilled. Where the suit was remanded to the Trial Court, and remand order, as a result of dismissal of the appellant's second appeal by the High Court, filed appeal before the Supreme Court would not be competent per force the amending Ordinance, XIII of 1983.

Termination of limited estate : Female holding only a usual widow's share in the State land under custom, had paid for acquisition of its proprietary rights only after the Shariat Laws had been made applicable to the State Lands in the year 1951. State held

by female, still being limited estate, provision of Section 3 of Act, 1962, which had terminated limited estates under custom would be attracted. Female would thus be entitled to hold only her share under the Muslim Law of Inheritance.

Termination of limited estate held by widow of deceased land-owner : Petitioners claiming to be collaterals of deceased land - owner claiming their share in property in question. Pedigree-table on record did not show that petitioners were collaterals of deceased land-owner in third degree as claimed by them. High Court did not interfere with concurrent findings of subordinate Courts on alleged relationship of parties. Judgments in previous litigation between widow of deceased land-owner and father of petitioners did not show that petitioners or their father was collateral of deceased land-owner. Judgment in previous litigation would not detract from concurrent findings of Courts below on the question in controversy. Interference was thus, not warranted in the judgment rendered by the High Court in circumstances.

Widow's share : Widow of last male owner becoming absolute owner of 1/4th share in estate left by her husband and remaining 3/4th share going to plaintiff. Widow could not pass valid title by sale in respect of anything over and above 1/4th share of land.

Life estate of widow : Widow was not entitled to alienate such property. On termination of limited estate by Muslim Personal Law (Shariat) Application Act, 1962, succession to property of last full owner opened and the same was legally to be divided among Shariat heirs of last full owner living at the time of his death. Widow being alive at the time of last full owner's death who died issueless was entitled to inherit 1/4th share. High Court had rightly modified judgments of Courts below by decreeing plaintiff's suit to the extent of 3/4th share (excluding widow's 1/4th share) leave to appeal was refused in circumstances.

Last male owner : "Last male owner" means who actually occupied property as owner.

Widow inheriting land : Widow inheriting land in question, as limited owner, after the death of her husband who died issueless. Widow subsequently applied for grant of proprietary rights which were granted to her with regard to whole of the tenancy. On widow's death her estate was inherited by respondents, *viz.*, her brother and sister. Widow was holding land as a limited owner till her death after the demise of her husband. Widow having died, property held by her had to revert to legal heirs of her deceased husband. Collector's orders passed after coming into force of the Muslim Personal Law (Shariat) Application Act, 1962, granting her proprietary rights with regard to whole of tenancy, were without legal force and were set aside. Widow having died when Act (V of 1962), was in force, she was

entitled to 1/4th share of property which would be inherited by her legal heirs, *i.e.*, respondents; while remaining 3/4th share would be inherited by the legal heirs of her husband. Conveyance deed executed under Section 30(2). Colonization of Government Lands (Punjab) Act, 1912, whereby widow was granted proprietary rights to the extent of the whole tenancy was rescinded and fresh deed in accordance with orders of the Board of Revenue was directed to be executed.

Last male owner having died issueless, his widow was declared to be owner to the extent of one-fourth of his share. Widow having migrated to Pakistan was allotted one-fourth share of the property to which she had been declared to be the owner in earlier round of litigation in India. The plaintiff failed to prove that deceased lady was holding land as limited owner. Deceased lady having disposed of her land as an owner, plaintiff claiming to be the collateral of last full owner could not claim anything from the property disposed of by the deceased lady.

Effect of Ordinance, XIII of 1983 on pending litigation : The predecessor-in-interest of the appellants purchased land from pre-deceassor-in-interest of the respondent before the partition of sub-continent when custom was the rule of inheritance. Vendor's son, *viz.*, respondent filed declaratory suit under the custom and got a decree. The respondent on death of his father, filed suit for possession on the basis of declaratory decree which was decreed. The decree for the possession of land in favour of the respondent was affirmed in the First and Second Appeals. When the petition for the leave to appeal was pending Ordinance, XIII of 1983 was promulgated. It was held that :

Provisions of clause (*b*) of Section 2-A, Muslim Personal Law (Shariat) Act, Application Act, 1962 as amended by the Ordinance, XIII of 1983, affected claim of the respondent and decree held by him on the basis of his customary right of inheritance had been rendered void, inexecutable and of no legal effect. Judgments of all the three Courts whereby, respondent's suit for possession had been decreed on the basis of his earlier decree obtained by him under the customary law were set aside. Appeal allowed in circumstances.

Provision of Section 2-A (*b*) of the Act declared any judgment or decree obtained by reversioners as void and of no legal effect. Where possession of such land had been delivered to plaintiffs (reversioners) in execution of Trial Courts decree was subject to the result of appeal and High Court in second appeal having set aside decrees of Courts below, mere delivery of possession to plaintiff would not make it a case of past and closed transaction High Court having rightly set aside decrees of Courts below, leave to appeal was refused in circumstances.

Provision of Section 2-A, Muslim Personal Law (Shariat) Application Act, 1962 (as added by Punjab Muslim Personal Law (Shariat) Application Act, (Amendment) Ordinance, 1983), did not apply to non-Muslims. Persons claiming to be non-Muslims (Ahmadis) had got decree under custom, whereby sale made by their father was deemed not to affect their reversionary rights after the demise of their father. Such decree-holders whether affected by Section 2-A, Muslim Personal Law (Shariat) Application Act, 1962. Case was remanded to First Appellate Court for determining the true faith of plaintiff and his father who had sold land in question; whether they professed Ahmadi faith and if found to fail within that fold, next question arising for decision would be the law governing their rights in the suit. Assumption for application of newly-added Section 2-A to Muslim Personal Law (Shariat) Application Act, 1962 by Ordinance, XIII of 1983 to parties without proper inquiry into the faith of plaintiff and his father, necessitated sending back the case to Appellate Court for fresh decision on merits in accordance with law. Sufficient material being not available on record for decision about faith of the plaintiff and his father, case was remanded for determining true faith of the plaintiff and his father and the effect on the case of Section 2-A, Punjab Muslim Personal Law (Shariat) Application Act, 1962.

The provision of Section 2-A was directed at removing that vestige of the custom which persisted on the rights of a Muslim inheriting ancestral property and the limitation being founded not on the statute but on the custom recognizing on interest of the reversioners in the ancestral property.

The provision of Section 2-A, being retrospective the devolution even if took place in 1940 would not be deemed to be under the customs.

Abolution of custom--Effect : Custom having sweepingly been abolished by the enforcement of the Shariat Application Act, succession to heirs of deceased Muslim would be regulated according to the Muslim Personal Law. Deceased father of the respondents/plaintiffs being last-male holder of disputed land and its absolute full owner, his heirs would be entitled to inherit his property according to Shariat. The plaintiff as daughter of deceased would be entitled to 2/3 share of his property. Deceased was survived by widow, she would get her prescribed share and being dead, her share would also go to the plaintiffs, thus entitling them to 2/3 + 1/8 = 19/24th share. The Residue 5/25th share would go to the defendants. Appeal in so far as based upon custom, abated and decree contained under custom modified accordingly.

Person holding the entire land as last male owner under custom since 1927 was to be deemed to be the absolute owner under the absolute owner under Section 2-A. Plea that proviso to Section 5 of the Muslim Personal Law (Shariat) Application Act, 1962 entitled the

female to inherit the share under the Sharia, in circumstances, was not relevant as Section 5 of the Act would come into play where the life estate terminated under Section 5. Where life estate of female terminated on her death which took place on 18th March, 1923, the property by virtue of Section 2-A vested absolutely in the last male owner who was predecessor-in-interest and suit against such male owner as such in the presence of Section 2-A was not maintainable.

Q. 14. What was the necessity for enacting the Muslim Personal Law (Shariat) Application Act of 1948 and 1962 ?

Ans. Before promulgation of Muslim Personal Law (Shariat) Application Act, 1948, custom was the rule where under questions regarding succession were solved. After promulgation of Shariat Act, 1948 Muslims were to be governed by Muslim Personal Law in matters of succession. The Act was however made applicable with effect from March, 1948. Object of this Act was that those persons who guide after the Act came into effect their estates were to be governed by this Act, but the persons who had died during the time when the custom was the rule of succession their estates were governed not by Muslim Law but by custom and this law did not affect that position.

Life estates of females, however, were not governed by this enactment.

In 1962 Muslim Personal Law (Shariat) Application Act, 1962 was enacted where under limited estate of females were terminated.

Custom having sweepingly been abolished by the enforcement of the Shariat Application Act, 1962 succession to heirs of deceased Muslim would be regulated according to Muslim Personal Law. Where deceased father of plaintiffs being last male holder of disputed land was its absolute owner his heirs would be entitled to inherit his property according to Shariat. The plaintiffs as daughters of deceased would be entitled to 2/3rd share of his property. Deceased was survived by widow who would get her prescribed share and being dead her share would also go to the plaintiffs. Thus entitling them to 2/3 + 1/8 = 19/24th share. The residue 5/24th share would go to his collaterals.

Person holding the entire land as last male owner under Custom since 1927 was to be deemed to be the absolute owner under Section 2-A. Plea that proviso to Section 5 of the Muslim Personal Law (Shariat) Application Act, 1962 entitled the female to inherit the share under the Sharia. In circumstances, was not relevant as Section 5 of the Act would come into play where the life estate terminated under Section 5. Where life estate of female terminated on her death which took place on 18th March, 1923, the property by virtue of Section 2-A vested absolutely in the last male owner who was predecesser-in-interest and suit against such male owner as such in the presence of Section 2-A was not maintainable.

DISSOLUTION OF MARRIAGE ACT, 1939

Q. 15. Enumerate various grounds for the dissolution of marriage under the Dissolution of Muslim Marriages Act, 1939.

Ans. Grounds for dissolution of marriage : A woman married under the Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely : --

(*i*) that the whereabouts of the husband have not been known for a period of four years;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years ;

(*v*) that the husband was impotent at the time of marriage and continues to be so ;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease ;

(*vii*) that she having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years

Provided that the marriage has not been consummated:

(*viii*) that the husband treat her with cruelty, that is to say ---

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*b*) associates with women of evil repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her from exercising her legal rights over it, or

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qur'an ;

(*ix*) on any other ground which is recognized as valid for dissolution of marriages under the Muslim Law :

Provided that--

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final ;

(*b*) a decree passed on ground (*i*) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform, his conjugal duties, the Court shall set aside the said decree ;

(*c*) before passing a decree on ground (*v*) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be important, and if the husband so satisfies the Court within such period no decree shall be passed on the said ground.

Q. 16. *A*, a Christian girl, adopted Islam and married *B*, a Muslim young man, under Islamic Law. A re-embraces Christianity and claims divorce on the grounds of her apostasy from Islam. Will A succeed? Discuss from the point of view of the provisions of Dissolution of the Muslim Marriages Act of 1939.

Ans. Effect of conversion to another faith : Under second proviso to Section 4 of the Dissolution of Muslim Marriages Act, 1939 the provisions of Section 4 do not apply to a woman converted to Islam from some other faith who re-embraces the former faith.

Here the Christian girl, gets converted to Islam and marries a Muslim young man. She re-embraces her former faith after some-time. The case is not governed by Section 4 of the Dissolution of the Muslim Marriages Act. Her marriage stands dissolved on her re-embracement of Christianity according to orthodox Islamic Law.

Had she not embraced Christianity but some other religion or had simply renounced Islam her marriage tie would not have been dissolved by this mere fact of apostasy from Islam under Section 4 of the Dissolution of Muslim Marriages Act. The wife, cannot, on the ground of her own apostasy alone, claim a decree of divorce, and she must establish any of the nine grounds given in the Act for this purpose. So Section 4 of the Dissolution of Muslim Marriages Act, 1939, abrogates the rule of pure Muslim Law that apostasy from Islam by the wife shall *ipso facto* dissolve her marriage tie. But this does not affect the rule of the Islamic Law that apostasy from Islam of the husband alone would *ipso facto* dissolve the marriage tie.
